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SYMPOSIUM

CAUGHT IN THE MIDDLE: THE ROLE OF STATE INTERMEDIATE APPELLATE COURTS

EDWARD W. NAJAM, JR.*

On March 30 and 31, 2001, the Indiana Court of Appeals and the *Indiana Law Review* co-sponsored a national symposium in Indianapolis on the role of state intermediate appellate courts entitled "Caught in the Middle: The Role of State Intermediate Appellate Courts." The idea for the symposium originated with Randall T. Shepard, Chief Justice of Indiana, and it was held in connection with the Court of Appeals' 2001 centennial celebration. It was my privilege to co-chair the symposium with Matthew T. Albaugh, then editor-in-chief of the *Indiana Law Review*.

Judges from twenty-two states attended, representing over half of the thirty-nine states that have intermediate appellate courts. To our knowledge, this was the first time a conference has been organized to consider the institutional role of state intermediate appellate courts. The symposium addressed eight topics. Professor Michael E. Solimine of the University of Cincinnati College of Law spoke on the judicial federalism and state jurisprudence. Justice Gary E. Strankman of the California Court of Appeal spoke on managing the appellate process. Chief Justice Shepard spoke on appellate judicial ethics. Dean Lauren K. Robel of the Indiana University School of Law—Bloomington spoke on published and unpublished opinions. Florida attorney John Paul Jones spoke on appellate alternative dispute resolution. Chief Justice Shirley S. Abrahamson of the Wisconsin Supreme Court spoke on judicial selection, retention and accountability. Justice Warren D. Wolfson of the Illinois Appellate Court spoke on the significance of oral argument. Chief Judge Sidney S. Eagles, Jr. of the North Carolina Court of Appeals spoke on the many constituencies of intermediate appellate courts. Responders included Professors Jeffrey W. Grove and Jeffrey O. Cooper of the Indiana University School of Law—Indianapolis, Chief Judge John T. Sharpnack and Judges Margret G. Robb and Paul D. Mathias of the Indiana Court of Appeals, and Jon Laramore, Special Counsel, Office of the Attorney General. The symposium dinner speaker was Linda Greenhouse, United States Supreme Court correspondent for the *New York Times*.

The symposium began with the premise that the role of state intermediate appellate courts has never been fully studied or acknowledged. The traditional law school curriculum emphasizes the federal courts. As Professor Grove

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correctly observes, the singular focus of some academics on the importance and excellence of the federal judicial system comes at the expense of a more balanced view of the complementary roles of federal and state courts.¹ The law schools and the profession would benefit if more emphasis were placed on the study of state jurisprudence and state court systems. With concurrent jurisdiction, state courts interpret and apply state law; they also adjudicate federal claims and federal rights. In recent years, a shift has occurred in the allocation of judicial power between the national government and the states. This “new judicial federalism” means more work for state intermediate appellate courts.

State trial and appellate courts handle most of the nation’s judicial business and dominate the judicial landscape with many more judges, courts and cases than their federal counterparts. Most litigation begins and ends in the courts of original jurisdiction—the trial courts, and appeals from trial court judgments are the exception. But in thirty-nine states, when an appeal is taken, that appeal is almost always to the state intermediate appellate court.

State intermediate appellate courts typically exercise mandatory jurisdiction over those appeals taken as a matter of right.² As such, they produce more opinions than any other state or federal appellate tribunal. With some exceptions, the highest courts of most states enjoy a discretionary docket. As Chief Judge Eagles notes, relatively few cases reach a state’s highest court.³ Thus, as a practical matter, state intermediate appellate courts are the *de facto* courts of last resort for most litigants.

State intermediate appellate courts are commonly considered courts of error, as distinguished from courts of doctrine. Federal appellate Judge Frank M. Coffin has observed, however, that the distinction between correcting error and developing law is often exaggerated.⁴ In fact, state intermediate appellate courts play a very substantial role in the development of the common law, the interpretation of statutes, the judicial review of administrative action, and

1. Jeffrey W. Grove, *Supreme Court Monitoring of State Courts in the Twenty-first Century: A Response to Professor Solimine*, 35 IND. L. REV. 365, 370-71 n.41 (2002).

2. The Indiana Constitution requires the Indiana Supreme Court to provide by rule “in all cases an absolute right to one appeal.” IND. CONST. art. 7, § 6. In almost all cases, that right of appeal is to the Indiana Court of Appeals. A constitutional right to appeal can also be found in Florida (appeals to district courts of appeal “may be taken as a matter of right”). FLA. CONST. art. 5, § 4(b)(1); Georgia (“The Court of Appeals shall be a court of review and shall exercise appellate and certiorari jurisdiction in all cases not reserved to the Supreme Court or conferred on other courts by law.”) GA. CONST. art. 6, § 5; Illinois (appeals to the appellate court “are a matter of right”) ILL. CONST. art. 6, § 6; Louisiana (“No person shall be subjected to imprisonment or forfeiture of rights or property without the right of judicial review based upon a complete record of all evidence upon which the judgment is based.”) LA. CONST. art. 1, § 19; and Missouri (“The court of appeals shall have general appellate jurisdiction in all cases except those within the exclusive jurisdiction of the supreme court.”) MO. CONST. art. 5, § 3. In most other states, the right to appeal is statutory.

3. Sidney S. Eagles, Jr., *Address from Chief Judge Eagles*, 35 IND. L. REV. 457, 463 (2002).

4. FRANK M. COFFIN, ON APPEAL: COURTS, LAWYERING, AND JUDGING 57 (1994).

virtually all areas of civil and criminal law. And as Professor Solimine observes, the vast majority of cases raising federal issues are litigated in state courts, not federal courts.⁵

In sum, as much as “ninety to ninety-five percent of the law work in the nation takes place in the state judicial systems.”⁶ Nevertheless, the impact of state intermediate appellate courts on the jurisprudential life of the nation has not been fully considered. Most of the scholarly literature on state courts focuses on state supreme courts and trial courts, not on intermediate appellate courts.⁷

In our federal system, “[t]he powers not delegated to the United States by the Constitution . . . are reserved to the States . . . or to the people.”⁸ Under this division of powers, state judiciaries have residual authority to decide state law questions, subject only to the Supremacy Clause. As early as 1874, in *Murdock v. City of Memphis*,⁹ the United States Supreme Court held that the meaning of state law is the province of the states and that the Supreme Court has no jurisdiction where the state court’s decision is sufficiently supported on state law grounds.¹⁰ This has been a well-established feature of our federal system. In *Michigan v. Long*,¹¹ an opinion grounded in principles of dual sovereignty and judicial federalism, the United States Supreme Court not only reiterated this doctrine but also adopted a new plain statement rule which, in order to avoid federal review of constitutional issues, requires the state court to enunciate “bona fide separate, adequate, and independent [state law] grounds” for its decision.¹² This rule can have a significant practical effect on state trial and appellate court judges, although Professor Solimine posits that the plain statement rule “has had relatively little effect on state court decision-making. . . .”¹³ Still, there is no sound reason why a state intermediate appellate court should not, when appropriate, invoke the plain statement rule and indicate whether or not the state constitution is the basis for its ruling, even when the state’s highest court has not previously addressed the issue.

Michigan v. Long rekindled widespread discussion over the constitutional relationship between the federal and state judicial systems. In addition, after *Michigan v. Long*, the Supreme Court has issued a number of decisions that indicate a shift in the allocation of power between the federal government and the states. In what Linda Greenhouse has called the Supreme Court’s “federalism revolution,” the Court has shown deference to the states in a number of cases,

5. Michael E. Solimine, *Supreme Court Monitoring of State Courts in the Twenty-first Century*, 35 IND. L. REV. 335, 362 (2002).

6. MICHAEL E. SOLIMINE & JAMES L. WALKER, RESPECTING STATE COURTS: THE INEVITABILITY OF JUDICIAL FEDERALISM 133 (Greenwood Press 1999).

7. Solimine, *supra* note 5, at 360.

8. U.S. CONST. amend. X.

9. 87 U.S. (20 Wall.) 590 (1874).

10. *Id.* at 635.

11. 463 U.S. 1032 (1983).

12. *Id.* at 1041.

13. Solimine, *supra* note 5, at 340.

including *United States v. Lopez*,¹⁴ *Printz v. United States*,¹⁵ *United States v. Morrison*,¹⁶ signaling that the Commerce Clause of the United States Constitution is not an unlimited source of federal authority. As the Supreme Court continues to emphasize limitations on the exercise of federal power, the role of the states will be enhanced, with a corresponding increase in the demands placed upon state court systems.

In addition, the Supreme Court has recognized the sovereign right of the states to afford individual liberties a more expansive interpretation under their own constitutions, and to impose greater restrictions on the police power than those deemed minimal under federal law.¹⁷ Thus, attorneys are more frequently raising state constitutional claims in the trial courts. Although the ultimate resolution of such claims remains the province of a state's highest court, state constitutional issues are more often presented in the intermediate appellate courts. Consequently, when both state and federal constitutional questions are raised, intermediate appellate courts usually have the first opportunity to declare whether the outcome rests on independent and adequate state grounds.

Alexis de Toqueville concluded in 1835, "Scarcely any question arises in the United States which does not become, sooner or later, a subject of judicial debate."¹⁸ Americans look to the courts to adjudicate not only the ordinary, traditional disputes but also the complex and far-reaching questions that confront our society, often driven by changing social, political and economic forces. As the first appellate tribunal to address such questions, state intermediate appellate courts are "caught in the middle" of many audiences and constituencies. These include the opposing parties, the state's highest court, the trial court, the practicing bar, the state legislature, the academic community, the general public, and the media.

These high volume appellate courts are also "caught in the middle" of a case management predicament. Sworn to consider each case on its merits, state intermediate appellate judges preside over growing caseloads with finite resources. They must determine how best to handle an avalanche of paper, leverage productivity through technology, and manage human resources and facilities to produce a steady stream of timely, well-reasoned written opinions. As the California Appellate Process Task Force chaired by Justice Strankman noted, "[t]here are an irreducible number of steps that must be taken to decide appeals correctly and prepare a written opinion explaining the basis of the appeal. . . ."¹⁹

The bulk of American law is made by the states and enforced by the states.²⁰

14. 514 U.S. 549 (1995).

15. 521 U.S. 898 (1997).

16. 529 U.S. 598 (2000).

17. See *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980).

18. ALEXIS DE TOQUEVILLE, *DEMOCRACY IN AMERICA* 207 (Oxford Univ. Press 1946).

19. APPELLATE PROCESS TASK FORCE, REPORT OF THE APPELLATE PROCESS TASK FORCE 29 (2000).

20. SOLIMINE & WALKER, *supra* note 6, at 7.

Given recent trends, we can anticipate that state intermediate appellate courts will continue to carry more than their weight in the administration of our nation's judicial business, despite being "caught in the middle."

SUPREME COURT MONITORING OF STATE COURTS IN THE TWENTY-FIRST CENTURY

MICHAEL E. SOLIMINE*

INTRODUCTION

Over two centuries ago, the Framers of the Constitution contemplated that the United States Supreme Court would, in certain circumstances, review decisions of state courts. Fulfilling that vision, the Supreme Court has periodically reviewed cases from state courts—at least those dealing in some way with federal law. As a result, there is nothing particularly novel about the Supreme Court hearing cases on appeal from state court, along with those from the lower federal courts.

The Supreme Court's monitoring of litigation in state court is simply another aspect of judicial federalism. That oft-used term¹ carries various meanings in different contexts. In modern discussions, it usually denotes two related themes. One theme involves examination of how courts, particularly federal courts, police the boundaries of power between federal and state government. This includes, for example, how federal courts interpret congressional power under the Commerce Clause or Section 5 of the Fourteenth Amendment; how federal courts interpret the Eleventh Amendment to prevent Congress from authorizing private plaintiffs to sue states for violations of federal law in federal court; or how the Supreme Court requires states to follow the Bill of Rights, incorporated through the Due Process Clause of the Fourteenth Amendment.

The second theme of judicial federalism relates to the interaction of federal and state courts. Examples here include the impact of jurisdictional and other procedural requirements in federal court by past, concurrent, or future litigation in state court; how state courts adjudicate issues of federal law; how the Supreme Court reviews such adjudication; and how state courts have interpreted their own constitutions to protect rights to an extent not found in federal constitutional law. The latter development of the past three decades is often referred to as the "new judicial federalism."²

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1. A search of the LEXIS law review database in March 2001 produced over 750 hits for the term "judicial federalism."

2. For a more complete discussion of the various strands of judicial federalism, see MICHAEL E. SOLIMINE & JAMES L. WALKER, *RESPECTING STATE COURTS: THE INEVITABILITY OF JUDICIAL FEDERALISM* 4-9 (1999). For brief discussions of the origin of the term "new judicial federalism," see G. ALAN TARR, *UNDERSTANDING STATE CONSTITUTIONS* 48, 138-39 (1998).

In this Article, I will address the second theme of judicial federalism, with particular focus on the role of Supreme Court review of decisions of state courts and its impact on the judicial system. In that regard, I will consider two apparent shocks to the system of review, one recent and well known, the other one longstanding, not so well known, and less the subject of comment. The first is *Bush v. Gore*,³ in which the Supreme Court reversed a decision of the Florida Supreme Court, thus resolving the post-presidential election controversy in favor of then Texas Governor George W. Bush. The Florida court's decision, ordering manual recounts of votes, was ostensibly based on state law, yet the Supreme Court majority (or at least three Justices thereof), in effect, disagreed with the interpretation of state law to enable it to reach the federal issues. The question is whether the majority's aggressive review portends a new role for the Court in other state court cases.

The second, less noticeable but potentially as profound a shock to the understood system of Supreme Court review, is the Court's decreasing caseload. Through most of the Twentieth Century the Court was deciding well over 100 cases per Term on the merits. As late as the mid-1980s, the number was almost 150. But starting in about 1990, the number has spiraled sharply downward, and for much of the 1990s, the Court was only deciding seventy to eighty cases per Term. Meanwhile, caseloads in the lower federal courts, and state courts, are either increasing or, at least, static. So the likelihood of review of any given decision, not high to begin with, is even lower today. What might account for the Supreme Court's shrunken caseload, and what are its implications for state court decision-making?

In this Article, I will focus on these two potential systemic shocks and address related issues. Part I considers the effect of Supreme Court review on the development of state constitutional law. After briefly surveying the history of Supreme Court review of state court decisions and of the new judicial federalism, Part I addresses the impact of two controversial Court decisions: *Michigan v. Long*,⁴ in which the Court held that review of federal issues was possible, unless the state court plainly stated that it was relying on state law, and the aforementioned *Bush v. Gore*.

Part II of this Article turns toward the Supreme Court's recent shrunken docket, and in particular its possible impact on the adjudication of federal issues in state courts. To that end, Part II documents the diminished overall caseload and the lessened review of cases from state courts. It then turns to the evidence on "parity," the concept that state courts are usually just as capable as federal courts of fully and fairly adjudicating federal rights. Lastly, Part II addresses whether parity is—or should be—dependent in part on the availability of Supreme Court review of state court decisions, and how the diminished caseload impacts that dependence.

Finally, Part III of this Article considers the role of state intermediate appellate courts (IACs) regarding the issues addressed in Parts I and II. Most of

3. 531 U.S. 98 (2000) (per curiam).

4. 463 U.S. 1032 (1983).

the cases and literature concern decisions by state supreme courts and the review of those decisions. Part III considers the heretofore neglected role of IACs in the new judicial federalism, and Supreme Court review of decisions of IACs, when the latter are not first reviewed by state supreme courts.

I. *MICHIGAN V. LONG*, *BUSH V. GORE*, AND THE DEVELOPMENT OF STATE CONSTITUTIONAL LAW

A. *Setting the Stage: Supreme Court Review and the New Judicial Federalism*

As already stated, the Supreme Court has been reviewing decisions from state courts for two centuries. It is beyond dispute that the Supreme Court is, and should be, the final expositor of federal law (within the court system, at least), as derived from the text and history of Article III of the Constitution. To perform that role and to ensure uniformity of federal law, the Supreme Court has from the beginning been statutorily empowered by Congress to review decisions of state courts. The somewhat complicated history of those provisions and the cases interpreting them need not concern us here.⁵ The principal statute as it stands now, enacted in 1914,⁶ has been interpreted to limit Supreme Court review to state court decisions based on federal law, not those based on state law grounds.⁷

State courts have long been deciding issues of federal constitutional and statutory law, and have, for equally long, been rendering decisions interpreting their own state constitutions as well.⁸ But only in the last three decades has state constitutional law, particularly regarding individual rights and liberties, been the special focus of attention by judges, litigants, and commentators. In the new judicial federalism, some state courts (particularly the highest courts of a state) have interpreted their own constitutions to protect liberty interests above the floor of rights found in the U.S. Constitution, as interpreted by the Supreme Court. *State Constitutions and the Protection of Individual Rights* was an influential law review article by U.S. Supreme Court Justice William Brennan,

5. For overviews of the history of Supreme Court review of state court decisions, see RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 492-509 (4th ed. 1996) [hereinafter HART & WECHSLER]; CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS 782-800 (6th ed. 2002).

6. 28 U.S.C. § 1257 (1994).

7. While the language of 28 U.S.C. § 1257 would seem to limit review to state cases presenting federal issues, it has been argued persuasively that there is no constitutional barrier to the Court also reviewing state decisions that were based on state law. The norm limiting review to cases raising federal issues is better viewed as a prudential one, based on respect for state autonomy when a state court interprets its own law. See Richard A. Matasar & Gregory S. Bruch, *Procedural Common Law, Federal Jurisdictional Policy, and Abandonment of the Adequate and Independent State Grounds Doctrine*, 86 COLUM. L. REV. 1291, 1294, 1372 (1986).

8. For an excellent historical discussion of the two-century development of state constitutions and of state constitutional law, see generally TARR, *supra* note 2.

who urged state judges to interpret expansively the rights-granting provisions of their own constitutions in response to the restrictive decisions of his own Court.⁹ As a result, for several decades state courts have issued hundreds of decisions expanding rights based on state law, beyond that found in the federal constitution.¹⁰

These developments have generated an enormous amount of scholarly literature as well.¹¹ A full summary of that literature is unnecessary here. Suffice it to say, there is much discussion of how state judges might interpret state constitutional provisions that are often (though not always) similar to their federal constitutional counterparts; whether and how state judges differ in their adjudication of state rights as compared to federal rights; and when and how activism by state judges is justified in areas largely bereft of federal judicial supervision (e.g., public school finance).¹²

More relevant for present purposes, however, is the fact that systematic studies demonstrate that most state courts, when presented with the opportunity, have chosen *not* to depart from federal precedents when interpreting the rights-granting provisions of state constitutions. In other words, the majority of state courts, on most issues, engage in an analysis in lockstep with their federal counterparts. This trend was first documented by Barry Latzer¹³ and James Gardner¹⁴ in the early 1990s and has been confirmed by numerous subsequent studies.¹⁵ Some of these studies either covered limited time periods or studied only one or two specific issue areas. More recent and comprehensive empirical studies essentially have confirmed the dominance of lockstep analysis, but also present a more nuanced picture than previous studies. For example, one recent study examined 627 state supreme court decisions, from twenty-five randomly chosen states, covering states' bills of rights in nineteen issue areas.¹⁶ The study confirmed the dominance of the lockstep for most issue areas, but found at least

9. See William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502-03 (1977). As a measure of the significance of the article, one survey found that this article ranked twenty-sixth on the list of the 100 most-cited law review articles. Fred R. Shapiro, *The Most-Cited Law Review Articles Revisited*, 71 CHI.-KENT L. REV. 751, 768 (1996).

10. For useful summaries and discussions of the burgeoning case law, see JENNIFER FRIESEN, *STATE CONSTITUTIONAL LAW* (2d ed. 1996 & Supp. 1999); TARR, *supra* note 2, at 165-72.

11. In her detailed treatise, Jennifer Friesen has a 107-page bibliography of books and law review articles, see FRIESEN, *supra* note 10, at 825-931, and an additional twenty-seven pages in the most recent supplement, see *id.* at 289-315 (Supp. 1999).

12. See generally SOLIMINE & WALKER, *supra* note 2, at 88-96.

13. See Barry Latzer, *The Hidden Conservatism of the State Court "Revolution,"* 74 JUDICATURE 190 (1991).

14. See James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761 (1992).

15. For discussion and summaries of other studies, see SOLIMINE & WALKER, *supra* note 2, at 89-96; TARR, *supra* note 2, at 167-68.

16. See James N.G. Cauthen, *Expanding Rights Under State Constitutions: A Quantitative Appraisal*, 63 ALB. L. REV. 1183, 1191-94 (2000) (describing methodology).

three areas (free exercise of religion, right to jury trial, and certain search and seizure issues) in which over half of the cases departed from the lockstep and granted more protection to the right involved.¹⁷ Another recent study, covering forty-nine states, examined state constitutional and statutory provisions, which in addition to case law, covered thirteen issues of criminal procedure.¹⁸ It found that forty-one of the states provided protection greater than federal law in at least one area, while four states departed from federal practice in nine of the areas.¹⁹ The mean number of doctrines per state in which there was greater protection than the federal standard was 3.14.²⁰

B. *The Impact of Michigan v. Long*

United States Supreme Court decisions have played some role in the development of the new judicial federalism. Recent developments in state constitutional law can be attributed, in part, to explicit or implicit reaction to Supreme Court decisions refusing to uphold or expand a particular right. It might seem, however, that potential Supreme Court review of state court decisions would not play a role. Since those decisions are based on *state* law, normally the Supreme Court should not be reviewing them at all.

The review function comes into play when the state court decision explicitly relies on both federal and state law, or is ambiguous on the issue of what source(s) of law is relied upon. In the former situation, the Supreme Court has held that review is normally unavailing if the state law component of the reasoning is adequate to resolve the case and is independent of federal law grounds. That principle, or something like it, has been the rule for years.²¹ In the latter situation, to determine if the independence prong has been met, the Court used various approaches, but settled in 1983 on a clear statement approach in the oft-discussed case, *Michigan v. Long*.²² The facts and holding are no doubt familiar and need only brief review here. The Michigan Supreme Court held a police search to be unlawful, and in doing so relied exclusively on federal case law, but for brief citations to the provisions of the Michigan Constitution

17. *See id.* at 1194-1202 (describing results).

18. *See* David C. Brody, *Criminal Procedure Under State Law: A State-Level Examination of Selective New Federalism* 7-8 (paper presented at National Conference on Federalism and the Courts, University of Georgia, Feb. 23-24, 2001) (describing methodology) (on file with author). The excluded, fiftieth state was California, the reason being that a constitutional provision in that state, added by referendum in 1982, limits the ability of state judges to depart from the lockstep in criminal cases. *Id.* at 25 n.1 (citing CAL. CONST. art. I, § 28(d)). The author of the study apparently felt that this provision so deprived California state judges of freedom of action that include California data would skew the national results.

19. *Id.* at 8.

20. *Id.* at 9-10 (describing results).

21. For discussions of the adequate and independent state ground doctrine, see HART & WECHSLER, *supra* note 5, at 524-90; LARRY W. YACKLE, *FEDERAL COURTS* 161-74 (1999).

22. 463 U.S. 1032 (1983).

analogous to the Fourth Amendment. The majority opinion by Justice O'Connor adopted as an interpretative rule that the adequacy and independence of a state ground must be "clear from the face of the opinion."²³ This default rule was necessary, the Court explained, to avoid advisory opinions, refrain from the "intrusive practice of requiring state courts to clarify" their opinions, and to maintain the uniformity of federal law.²⁴ Under the newly clarified test, the Court found no plain statement of reliance on state law in the Michigan Supreme Court opinion and thus proceeded to reach the merits of the case.²⁵ The Court has adhered to and applied the "plain statement rule" in subsequent cases.²⁶

I have previously summarized some questions raised as to the impact of *Michigan v. Long* on the new judicial federalism:

Coming as it did, just as the idea of increased state court reliance on their own constitutions began to flower, it was no shock that *Michigan v. Long* generated considerable academic commentary. Some argued that the new plain statement rule unnecessarily expanded federal jurisdiction and was a thinly veiled attempt to chill the expansion of rights by state courts. Others supported the decision, arguing that it preserved the need for uniformity in federal law and could encourage an intersystem dialogue on the scope of rights between different levels of court. Likewise, some argued that the plain statement rule would be a disincentive for state courts to expand rights under their own constitutions, as it would purportedly be difficult to comply with, and expose a forthright state court to the displeasure of the electorate. Others contended that the rule would encourage state courts to develop their own law, since those courts would, presumably, be motivated to consider whether they should rely on federal or state law.²⁷

In my view, *Michigan v. Long* has had relatively little effect on state court decision-making, and to the extent that it has, it has been more positive than negative. Start with the proposition of some critics that the Supreme Court should not at all be reviewing state court decisions that overenforce federal rights.²⁸ The proposition is not persuasive. In our hierarchical system of courts, it has long been the norm that appellate courts will review the actions of lower

23. *Id.* at 1041.

24. *Id.*

25. *See id.* at 1043-44.

26. *See, e.g.,* *Ohio v. Reiner*, 532 U.S. 17 (2001) (per curiam); *Ohio v. Robinette*, 519 U.S. 33 (1996); *Pennsylvania v. Labron*, 518 U.S. 938 (1996) (per curiam); *Arizona v. Evans*, 514 U.S. 1 (1995).

27. SOLIMINE & WALKER, *supra* note 2, at 99 (footnotes omitted).

28. *See Michigan v. Long*, 463 U.S. 1032, 1065-70 (1983) (Stevens, J., dissenting); *cf.* Harold J. Krent, *The Supreme Court as an Enforcement Agency*, 55 WASH. & LEE L. REV. 1149, 1188-1205 (1998) (extolling benefits of state courts overenforcing federal rights, and discussing though apparently not expressly disagreeing with *Michigan v. Long*).

courts. The norm has a long pedigree for Supreme Court review of state courts.²⁹ Since state courts are, after all, staffed by state personnel, it is no insult to state judges that their exposition of federal law will be subject to review by the final expositor of federal law for all fifty states. Indeed, such review heightens the probability that state judges are correctly following federal law, no small matter given the vast numbers of state court cases and the limited caseload capabilities of the Supreme Court.³⁰

To the extent *Michigan v. Long* in theory permits more review of state court decisions bearing on federal law, it will in theory lead to greater uniformity of federal law. This seems unobjectionable enough, but in a federal system of government, a “fetish should not be made out of uniformity.”³¹ Even with regard to federal law, uniformity is impossible. The Supreme Court cannot review even a significant percentage of cases raising federal issues decided in the lower *federal* courts, much less those from state courts, and as a result federal law will always be marked by some lack of uniformity.³² However, we should not go out of our way to institutionalize a lack of uniformity in federal law either.

Difficulty in compliance with the plain statement rule likewise cannot be seriously contended.³³ More intriguing is, given that ease, why it appears that

29. See generally Martin H. Redish, *Supreme Court Review of State Court “Federal” Decisions: A Study in Interactive Federalism*, 19 GA. L. REV. 861 (1985).

30. This point is developed *infra* Part III.

31. SOLIMINE & WALKER, *supra* note 2, at 101. Making uniformity the paramount or only value would unnecessarily denigrate other values of federalism, such as promoting experimentation and protecting liberty by decentralizing power. For an excellent discussion of the various aims of federalism, see Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317 (1997).

32. LISA A. KLOPPENBERG, *PLAYING IT SAFE: HOW THE SUPREME COURT SIDESTEPS HAND CASES AND STUNTS THE DEVELOPMENT OF THE LAW* 101 (2001). Some disparity in federal law is not only inevitable, but tolerable and even welcome. The precedential authority of rulings of the lower federal courts and of state courts will be confined to either one state (or part of one state) or at most several states within a U.S. Court of Appeals Circuit. Disparate federal law rulings on whose effects are not externalized beyond those regions are not especially problematic. In addition, there may be advantages to having such disparity should the Supreme Court eventually decide to settle the issue. SOLIMINE & WALKER, *supra* note 2, at 71; see also Arthur D. Hellman, *Light on a Darkling Plain: Intercircuit Conflicts in the Perspective of Time and Experience*, 1998 SUP. CT. REV. 247 (studying unresolved conflicts among the federal circuit courts and finding that disruption and uncertainty of such conflicts are often less problematic than commonly assumed).

33. Jennifer Friesen lists several model plain statements, drawn from those used in cases:

1. In reaching this conclusion, we do not rely on federal authorities, and any reference to them is solely for illusive purposes. The [State] Constitution provides separate, adequate, and independent grounds upon which we rest our findings.”
2. “Our decision is based solely upon adequate and independent state ground. *Michigan v. Long*, 463 U.S. 1032, 103 S. Ct. 3469, 77 L.Ed.2d 1201 (1983).”
3. “We base our decision strictly upon the [State] Constitution; any reference to the United States Constitution is merely for guidance and does not compel our decision.”

many state courts do not make plain statements of reliance on state law when given the opportunity, or simply remain ambiguous on the issue. One possible reason, of course, is that state judges may find it inappropriate to depart from federal precedent, and thus reject developing a different state constitutional rule. In many instances, however, they do not clearly articulate that in their opinions. Another possible reason is that attorneys out of design or ignorance may ignore the issue and rely exclusively on federal law in their briefing.³⁴

The relatively low rate of making plain statements has also been linked to the alleged electoral effects of *Michigan v. Long*. Some supporters and critics of the decision appear to argue, to varying degrees, that the plain statement rule encourages strategic behavior by judges. State judges, many of whom are elected, may take more or less political heat from interested people for decisions, depending on the reasoning they supply for the decision. Thus, for example, Ann Althouse has suggested that the plain statement rule “forces state judges to endure one form of scrutiny or the other and deprives them of the ability to immunize themselves with ambiguity.”³⁵ Or, as Edward Hartnett has argued, the plain statement rule encourages or at least reminds state judges to rely on federal law:

A state court that invalidates state action on federal constitutional grounds is protected from popular accountability by the availability of review in the Supreme Court. In effect, the state court can say, “If you don’t like what we’ve done, ask the Supreme Court of the United States to review it.” If the Supreme Court denies certiorari—as it does in the vast majority of cases—responsibility for the judgment is spread between the state court and the Supreme Court.³⁶

Hartnett goes on to suggest that this “helps explain why state judges have voiced so little opposition to *Michigan v. Long*,” and why they frequently rely on the lockstep analysis in practice.³⁷

4. “Federal precedents cited herein are merely illustrative and do not compel the result we reach.”

5. “In this case, as in all cases [decided by this court], any reference to federal law is for illustrative purposes only and in no way compels the result reached in this or any other case.”

FRIESEN, *supra* note 10, at 56 (footnotes omitted) (alterations in source).

34. See Jennifer Friesen, *State Courts as Sources of Constitutional Law: How to Become Independently Wealthy*, 72 NOTRE DAME L. REV. 1065, 1071 (1997); cf. Christo Lassiter, *Eliminating Consent from the Lexicon of Traffic Stop Interrogations*, 27 CAP. U. L. REV. 79, 105 (1998) (“Of course the best strategy available to litigants in constitutional litigation is to brief claims under both federal and independent state grounds.”).

35. Ann Althouse, *Variations on a Theory of Normative Federalism: A Supreme Court Dialogue*, 42 DUKE L.J. 979, 989 (1993).

36. Edward Hartnett, *Why Is the Supreme Court of the United States Protecting State Judges from Popular Democracy?*, 75 TEX. L. REV. 907, 980 (1997) (footnote omitted).

37. *Id.* at 981-82.

While there is some validity in these arguments, the asserted electoral connection is overstated. It is well documented that the vast majority of state judicial elections, whether in contested races or for retention elections, are low-profile affairs. Many voters do not vote in judicial races at all. Those who do often base their vote on name recognition or partisan affiliation rather than on the "issues" in any meaningful sense of the term. There is a very high rate of reelection for incumbent judges under any electoral scheme, and many judges, especially on lower courts, run unopposed.³⁸

To be sure, there is evidence that elections for state judges, particularly on supreme courts, have become more contentious and contested. Some of this is due, at least in part, to controversial rulings based on state constitutional law.³⁹ But there seems to be little systemic evidence that the increasing attention given to some judicial races is driven by the parsing of court decisions to see if reliance has been made on federal or state law. If anything, data from a broad range of cases seems to suggest the lack of a connection between the judicial electoral structure of a state and its propensity to develop state constitutional law. For example, one of the systemic studies of the new judicial federalism, referenced earlier, found that states whose supreme court justices were appointed or selected by merit with retention elections were *less* likely to provide protections above the federal floor than states that used contested elections.⁴⁰ Studies of state supreme court decision-making on more specific issues, such as school-financing litigation⁴¹ or the legality of confessions to police,⁴² found no correlation between

38. For summaries and discussion of the considerable literature supporting the assertions made in this paragraph, see Larry Aspin, *Trends in Judicial Retention Elections, 1964-1998*, 83 JUDICATURE 79 (1999); Richard L. Hasen, "High Court Wrongly Elected": A Public Choice Model of Judging and Its Implications for the Voting Rights Act, 75 N.C. L. REV. 1305 (1997); Michael E. Solimine, *The False Promise of Judicial Elections in Ohio*, CAP. U. L. REV. (forthcoming 2002).

39. See Paul D. Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, 61 LAW & CONTEMP. PROBS. 79, 99-107 (1998); Gerald F. Uelman, *Crocodiles in the Bathtub: Maintaining the Independence of State Supreme Courts in an Era of Judicial Politicization*, 72 NOTRE DAME L. REV. 1133 (1997).

40. Brody, *supra* note 18, at 17, 19; see also James N.G. Cauthen, *Judicial Innovation under State Constitutions: An Internal Determinants Investigation*, 21 AM. REV. POL. 19, 19, 32-34 (2000) (discussing study of state constitutional bill of rights cases, from state supreme courts in twenty states, covering 532 cases from 1970 to 1994, that indicates inter alia that judicial independence is not correlated with upholding such rights in a statistically significant way).

41. See Paula J. Lundberg, *State Courts and School Funding: A Fifty-State Analysis*, 63 ALB. L. REV. 1101, 1136 (2000); Karen Swenson, *School Finance Reform Litigation: Why Are Some State Supreme Courts Activist and Others Restrained?*, 63 ALB. L. REV. 1147, 1174 (2000). Perhaps illustrating the lack of consensus on whether state judicial selection methods impact state constitutional law, these studies started out with opposite hypotheses. Compare Swenson, *supra*, at 1152 ("Elective courts are more likely to strike down school finance schemes than are appointive courts."), with Lundberg, *supra*, at 1128 ("[e]lected judges would be less likely to vote to overturn state school finance legislation. . .").

For purposes of this Article, these conclusions must be used with caution. School finance

the method of judicial selection and the level of activism (or lack thereof) on these issues.

These studies, then, seem to undermine the notion that the plain statement rule, for good or ill, impacts the propensity of judges to rely on state constitutional law. If it did, we would expect state judges less subject to popular accountability to be more likely to develop state constitutional law. Over the broad range of cases and issues, the evidence does not support that view.

C. *The Impact of Bush v. Gore*

We now come to the two Supreme Court decisions handed down in December 2000, *Bush v. Palm Beach County Canvassing Board (Bush I)*,⁴³ and *Bush v. Gore (Bush II)*.⁴⁴ The two cases vacated decisions from the Florida Supreme Court, upheld the certification of Florida's electoral votes for then-Governor George W. Bush, and effectively determined the winner of the presidential election. Some critics, arguing that the decisions were result-oriented, contended that the Supreme Court had unnecessarily and inappropriately reviewed state court decisions based exclusively on state law. Much can and should be said about the cases.⁴⁵ But in my view, the Supreme Court reviewing these purportedly state-law based decisions was unremarkable, given precedent, and it is unlikely to be an omen for more aggressive Supreme Court review in the future.

To see why, we need to review briefly *Bush I* and *Bush II*. Given that most

litigation does not implicate *Michigan v. Long*, because the Supreme Court held almost three decades ago that the issue would only be subject to rational basis scrutiny under the Equal Protection Clause. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 40 (1973). Thus, such cases are not brought in federal court, given their low likelihood of success in that forum. Also, such litigation is arguably in many cases an exception to the low profile norm. Death penalty cases might be another rare exception. For discussions of these types of cases, see SOLIMINE & WALKER, *supra* note 2, at 92-93, 118-19.

42. Sara C. Benesh & Wendy L. Martinek, *State-Federal Judicial Relations: The Case of State Supreme Court Decision Making in Confession Cases* 24-25, 28 (paper presented at conference on federalism and the courts, University of Georgia, Feb. 23-24, 2001) (studying 399 cases from state supreme courts from 1970 to 1991) (on file with author).

43. 531 U.S. 70 (2000) (per curiam).

44. 531 U.S. 98 (2000) (per curiam).

45. For an extensive compilation of contemporary material and commentary about the cases, see *BUSH V. GORE, THE COURT CASES AND THE COMMENTARY* (E.J. Dionne, Jr. & William Kristol eds., 2001). For a small sampling of early academic commentary, see SAMUEL ISSACHAROFF ET AL., *WHEN ELECTIONS GO BAD: THE LAW OF DEMOCRACY AND THE PRESIDENTIAL ELECTION OF 2000* (2001); *THE VOTE: BUSH, GORE AND THE SUPREME COURT* (Cass R. Sunstein & Richard A. Epstein eds., 2001); Symposium, *Bush v. Gore*, 68 U. CHI. L. REV. 613 (2001); Lonny Sheinkopf Hoffman, *A Window into the Courts: Legal Process and the 2000 Presidential Election*, 95 NW. U. L. REV. 1533 (2001) (reviewing ISSACHAROFF ET AL., *supra*); Note, *Non Sub Homine? A Survey and Analysis of the Legal Resolution of Election 2000*, 114 HARV. L. REV. 2170 (2001).

readers will know the facts in excruciating detail, for present purposes I need only focus on the procedural and jurisdictional posture of the cases. In *Bush I*, the Florida Supreme Court ordered the Florida Secretary of State to permit certain manual recounts of votes in the presidential election to go forward. The Supreme Court granted certiorari on whether the Florida court's order effectively changed state electoral law after the vote in a way that violated federal statutory and constitutional provisions that: seemingly limit such changes after election day; and lodge exclusive authority in state legislatures to designate presidential electors.⁴⁶ The Florida Supreme Court had only briefly referred to the federal statutes in a footnote, and the Supreme Court thought the opinion was unclear on the Florida court's construction and application of state law in light of the federal provisions.⁴⁷ In a unanimous per curiam decision, the Supreme Court vacated and remanded for further proceedings, given the "considerable uncertainty as to the precise grounds for the [Florida court's] decision."⁴⁸

Several days later, in parallel litigation, the Florida Supreme Court again ordered that certain manual recounts of votes for President go forward. Review was again sought and obtained, and this time the Supreme Court in *Bush II* reversed on the merits. The five-member majority, in a per curiam opinion, held that the Equal Protection Clause was violated by the Florida court ordering that manual recounts could proceed by different standards in different counties.

Chief Justice Rehnquist, in a concurring opinion joined by Justices Scalia and Thomas, further found that the Florida Supreme Court's interpretation and application of the state election statute so departed from the original legislative scheme that it violated Article II.⁴⁹ To reach that conclusion, the concurring opinion extensively reexamined the state law basis of the opinion. As a preface to doing that, the opinion provided several pages justifying the Court's review of the state law basis of the decision below. "In most cases," the concurring members of the Court conceded, "comity and respect for federalism compel us to defer to the decisions of state courts on issues of state law."⁵⁰ But the opinion cited two examples where "the Constitution requires this Court to undertake an independent, if still deferential, analysis of state law."⁵¹

One example cited was the 1958 decision of *NAACP v. Alabama ex rel.*

46. 531 U.S. at 73 (citing U.S. CONST. art. II, § 1, cl. 2, the Due Process Clause, and 3 U.S.C. § 5 (2000)).

47. *Id.* at 78.

48. *Id.* (quoting *Minnesota v. Nat'l Tea Co.*, 309 U.S. 551, 555 (1940)). On the day before the U.S. Supreme Court decided *Bush II*, the Florida Supreme Court reached on remand the same result as it did originally. See *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1273, 1281, 1291 (Fla. 2000) (per curiam). "But it reached that result in a strikingly different manner[.]" ISSACHAROFF ET AL., *supra* note 45, at 95, heavily emphasizing that it was engaging in standard legislative interpretation. The decision the next day in *Bush II* rendered the Florida Supreme Court's decision "essentially moot." *Id.* at 96.

49. *Bush II*, 531 U.S. at 115 (Rehnquist, C.J., joined by Scalia & Thomas, JJ., concurring).

50. *Id.* at 112.

51. *Id.* at 114.

Patterson,⁵² in which the Supreme Court refused to defer to the Alabama Supreme Court's asserted reason for not permitting a federal issue to be raised, specifically that the correct appellate remedy had not been sought.⁵³ That was not an adequate ground of state law, the Court held, because the novelty of the rationale could not be squared with Alabama precedent.⁵⁴ Similarly, in the 1964 decision of *Bouie v. City of Columbia*,⁵⁵ the Court concluded that the South Carolina Supreme Court had violated due process by improperly broadening the scope of a state criminal statute, as that reading was not supported by state precedent.⁵⁶ The concurrence in *Bush II* stated that what it was doing "in the present case [was] precisely parallel."⁵⁷

All four dissenting Justices submitted separate opinions, but for present purposes the most relevant is Justice Ginsburg's dissent because she was the only one who directly confronted the concurring opinion's treatment of precedent on the review issue. Justice Ginsburg, like the Chief Justice, began with the customary reminder that the Court should only reexamine state law to protect federal rights in rare occasions, with deference to a state court's interpretations of its own law.⁵⁸ "Rarely," she wrote, "has this Court rejected outright an interpretation of state law by a state high court."⁵⁹ The cases cited by the Chief Justice, she acknowledged, were "such rare instances,"⁶⁰ but she argued that "those cases are embedded in historical contexts hardly comparable to the situation here."⁶¹ She noted that *NAACP* was decided "in the face of Southern resistance to the civil rights movement," as was *Bouie*⁶² and that "this case involves nothing close to the kind of recalcitrance by a state high court that warrants extraordinary action by this Court."⁶³ She concluded that the Florida Supreme Court's construction of election statutes was reasonable and did not

52. 357 U.S. 449 (1958).

53. *Id.* at 454-55, 458.

54. *Id.* at 456-58.

55. 378 U.S. 347 (1964).

56. *Id.* at 361-62.

57. 531 U.S. at 115 (Rehnquist, C.J., joined by Scalia & Thomas, JJ., concurring).

58. *See id.* at 135-39 (Ginsburg, J., joined by Stevens, Souter, & Breyer, JJ., dissenting). She added in this regard that the Court could "resolve doubts about the meaning of state law by certifying issues to a State's highest court, even when federal rights are at stake." *Id.* at 138. However, she did not expressly call for the use of certification in *Bush II*, perhaps due to time constraints, or because it was more appropriate to use it in *Bush I* as opposed to *Bush II*. For a rare example of the Supreme Court using the certification process, see *Fiore v. White*, 531 U.S. 225 (2001) (per curiam) (deciding case in light of answer by Pennsylvania Supreme Court to previously certified question).

59. *Bush II*, 531 U.S. at 139.

60. *Id.* at 140.

61. *Id.*

62. *Id.*

63. *Id.* at 140-41.

violate the Federal Constitution.⁶⁴

Despite the obvious high importance and drama of these decisions, to the extent they frame the Supreme Court's relationship with state courts, they are for the most part unexceptional applications of settled doctrine.⁶⁵ First, consider *Bush I*. When it was vacated and remanded for further clarification by the Florida Supreme Court, it relied on precedent permitting that disposition in deference to the state court.⁶⁶ Invoking the *Michigan v. Long* plain statement rule would have been inappropriate, because "the ambiguity of the state court opinion was not about whether it rested on a state or a federal ground, but rather (at least with regard to the question of the import of the state constitution) about what the state ground of decision was."⁶⁷ It is unlikely that *Bush I* makes any change to *Michigan v. Long* and its progeny.

Bush II is something else but, properly understood, works no change in existing doctrine. For present purposes the most significant part of that opinion is the debate between Chief Justice Rehnquist and Justice Ginsburg on the propriety of the Supreme Court reexamining state law on its own terms, even when expounded by the state's highest court. At the outset, this debate did not implicate the core of the adequate and independent state ground doctrine. The typical case is one where the state court does not reach an asserted federal ground because the party pressing that issue has waived the issue for failure to comply with a state procedural rule. Here, in contrast, the lower court did not purport to fail to reach a federal issue for that reason. Rather, it was the very state-law-based nature of the decision below that itself was alleged to violate the Federal Constitution. Ample precedent permits the Supreme Court to review such a case.⁶⁸ In any event, despite Justice Ginsburg's efforts to undermine the

64. See *id.* at 141-43.

65. I do not consider here whether the same could be said for the majority's resolution of the merits of the cases, e.g., whether the majority's Equal Protection holding can or should be cabined to presidential elections. For discussion of those issues, see ISSACHAROFF ET AL., *supra* note 45; Pamela S. Karlan, *Nothing Personal: The Evolution of the Newest Equal Protection from Shaw v. Reno to Bush v. Gore*, 79 N.C. L. REV. 1345 (2001).

66. Vacation, used in the case cited as precedent for the disposition, see *supra* note 48 and accompanying text, had been discussed in *Michigan v. Long* as one of the relatively unsatisfactory prior approaches the Court had taken to dealing with ambiguity in state court opinions. See *Michigan v. Long*, 463 U.S. 1032, 1039-40 (1983). However, in *Michigan v. Long* the Court expressly noted that "[t]here may be certain circumstances in which clarification is necessary or desirable, and we will not be foreclosed from taking the appropriate action." *Id.* at 1041 n.6.

67. HART & WECHSLER, *supra* note 5, at 3 (Jan. 2001 Special Update Memorandum on the Supreme Court's Decisions Concerning the 2000 Presidential Election). Also, "the Court may have been particularly eager in this setting to avoid definitive resolution of novel constitutional questions unless truly necessary, as well as to seek a disposition that, by avoiding the merits, permitted unanimity." *Id.*

68. This point is carefully and persuasively explained in Michael Wells, *Were There Adequate State Grounds in Bush v. Gore?*, CONST. COMM. (forthcoming 2002) (manuscript on file with author).

precedential value of the cases where the Court reexamined state law, those cases have an impressive pedigree. For example, the two modern cases relied upon by the Chief Justice, *NAACP* and *Bouie*, were written by Justices Harlan (for a unanimous Court) and Brennan, respectively. Those cases, and others, have been routinely discussed by scholars as unexceptional and almost uncontroversial precedent permitting the Court to reexamine state law.⁶⁹

Justice Ginsburg also suggested that the generative force of those cases was lessened by their being rendered to vindicate federal rights undermined by state courts during the civil rights movement. The Florida Supreme Court in *Bush II*, she said, “surely should not be bracketed with state high courts of the Jim Crow South.”⁷⁰ Her forthright description of the political context of the decisions, then and now, is refreshingly candid and to my knowledge not matched in other opinions involving the adequate and independent grounds doctrine.⁷¹

Considerable evidence also supports her view of the recalcitrance of at least some of the state courts in the deep South during the Civil Rights Era, and of subsequent changes.⁷² Nor is Justice Ginsburg the first to suggest that the Court may have bent jurisdictional rules during the Civil Rights Era to enable it to reach the merits of cases where, for example, review would otherwise have been barred by the adequate and independent state ground doctrine.⁷³ But it is hard to take seriously her apparent argument that cases like *NAACP* and *Bouie* are contextual, situational, and entitled to little or no precedential value, depending

69. See, e.g., MARTIN H. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 270-71 (2d ed. 1990); YACKLE, *supra* note 21, at 172-73; see also 16B CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 4027, at 387 (2d ed. 1996) (describing *NAACP* as the “leading decision”).

70. 531 U.S. 98, 141 (2000) (Ginsburg, J., dissenting).

71. No doubt, this is because it is “both difficult and awkward for the Supreme Court to inquire into the motives of the state court.” REDISH, *supra* note 69, at 269. The Court, therefore, usually focuses on more objective criteria, such as whether the state ground is arbitrary, lacks “fair or substantial support,” or is novel. *Id.* at 269-71.

Agreeing with Justice Ginsburg’s interpretation of *NAACP* and *Bouie*, Michael Klarman has argued that those cases were inopposite to *Bush II*, because “the rule generated by these cases seems to be one requiring evidence of bad faith by the state courts in their interpretation of state law.” Michael J. Klarman, *Bush v. Gore Through the Lens of Constitutional History*, 89 CAL. L. REV. 1721, 1738 (2001). But neither case discusses, much less requires, “bad faith,” however defined. Nor to my knowledge do other cases exploring the adequacy prong of the adequate and independent ground doctrine, not all of which, of course, come from state courts in the Deep South during the Civil Rights Era. See also Wells, *supra* note 68, for further discussion of this point. For a careful and nuanced discussion of the structural considerations that might justify systemic distrust of state court application of state law, at least in election law cases, see Richard H. Pildes, *Judging “New Law” in Election Disputes*, 29 FLA. ST. U. L. REV. 691, 711-25 (2001).

72. For a summary and discussion of sources that largely support Justice Ginsburg’s points, see SOLIMINE & WALKER, *supra* note 2, at 35-36.

73. See HART & WECHSLER, *supra* note 5, at 576-77; Robert Jerome Glennon, *The Jurisdictional Legacy of the Civil Rights Movement*, 61 TENN. L. REV. 869, 870 (1994).

on the “real” motives of the court below. Such an inquiry on that basis alone would open other precedent to similar attack. For example, a number of modern authorities assert that many path-breaking criminal procedure decisions of the Warren Court were driven, at least in part, by the treatment of black suspects in deep South courts.⁷⁴ Now that conditions in southern courts have presumably and hopefully changed, would Justice Ginsburg urge that those precedents be discarded as well?

A more persuasive component of Justice Ginsburg’s opinion was her argument that the Florida Supreme Court’s construction of its own election law was due greater deference. She observed that simply disagreeing with another tribunal’s construction of its own law does not make it unreasonable.⁷⁵ While both she and the Chief Justice called for some level of deference, neither were entirely clear on the *level* of deference.⁷⁶ From the standpoint of using precedent, this is perhaps the most problematic aspect of the jurisdictional basis of *Bush II*. Even on these narrow points, only opinions joined by four Justices were fully engaged on the issue, and only the concurring opinion undertook arguably undeferential reexamination of state law. Add to that the highly unusual facts presented, and it is fair to conclude that “*Bush v. Gore* seems unlikely to become a leading precedent for the scope of review [by the Supreme Court] of state law questions that implicate federal protections.”⁷⁷

74. See, e.g., Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48-49 (2000); David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 315-16; William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 5 (1997).

75. See *Bush v. Gore*, 531 U.S. 98, 136 (2000) (Ginsburg, J., dissenting).

76. For careful and extended analysis of this point, see Harold J. Krent, *Judging Judging: The Problem of Second Guessing State Judges’ Interpretation of State Law in Bush v. Gore*, 29 FLA. ST. U. L. REV. 493 (2001).

The concurring opinion did seem to indicate that deference would be limited through the language of Article II, Section 1, Clause 2 of the Constitution (“[e]ach State shall appoint, in such Manner as the Legislature thereof may direct,” presidential electors). It asserted that “the text of the election law itself, and not just its interpretation by the courts of the States, takes on independent significance.” *Bush II*, 531 U.S. at 112-13 (Rehnquist, C.J., concurring) (citing U.S. CONST. art. II, § 1, cl. 2). Justice Ginsberg disputed the assertion, arguing that under a republican form of government, which the State of Florida has, it would be understood that “the judiciary would construe the legislature’s enactments.” *Id.* at 141 (Ginsburg, J., dissenting). Hence, she wrote, “Article II does not call for the scrutiny undertaken by this Court.” *Id.* at 142.

77. HART & WECHSLER, *supra* note 5, at 9 (Jan. 2001 Special Update Memorandum on the Supreme Court’s Decisions Concerning the 2000 Presidential Election).

II. THE SUPREME COURT'S SHRUNKEN DOCKET AND THE DEVELOPMENT OF FEDERAL LAW IN STATE COURTS

A. *The Shrunk Docket*

The adequate and independent state ground doctrine, whatever its formulation, in theory permits the Supreme Court to review and, if necessary, correct state court holdings that were based on federal law. Whether the Supreme Court has the institutional resources or desire to seriously undertake this function is another matter. The Court's own docket is the starting point for studying this issue.

For virtually all of the Twentieth Century, the Supreme Court decided an average of 150 cases per Term. As of the late 1980s, that number was almost 130 per Term. Starting in 1990, the numbers began rapidly falling below 100, until by the late 1990s the Court was only deciding seventy or eighty cases per Term.⁷⁸ What accounts for the shrunk docket of late? There are few official reasons given for the size or content of the Court's docket in any given Term. The Court's own rules state obliquely that it will review important issues of federal law, conflicts among federal courts, and conflicts between federal and state courts. Beyond that, the Court rarely states why it is granting review, either at the time of doing so or in its subsequent opinion on the merits. It is rarer still for the Court or an individual Justice to state why a case is *not* being reviewed.⁷⁹

The Court, similarly, has not made any official pronouncements about the decreasing size of the docket over the past decade. This has led to considerable speculation as to the Justices' motivations in denying review at an increasing rate, despite the fact that the number of certiorari petitions has not abated.⁸⁰ Among the arguments advanced are that a more conservative Court majority has found fewer lower court cases to reverse; that the Court wishes to spend more time on each case and opinion; or even that the Justices are lazier or simply enjoy their leisure time.⁸¹ Several years ago, Arthur Hellman compared the docket of

78. Data for recent Terms can be found in the Supreme Court's annual Year-End Reports on the Federal Judiciary, available on the Court's website, <http://www.supremecourtus.gov/publicinfo/year-end/year-end-reports.html> (last visited Jan. 22, 2002). For a good summary of data, drawn from various sources, for the 1926 through 1995 Terms, see LEE EPSTEIN ET AL., *THE SUPREME COURT COMPENDIUM* 84-85 tbl.2-7 (2d ed. 1996) (signed opinions, cases disposed of by signed opinion, and cases disposed of by per curiam opinion, 1926-1995 Terms). Other useful sources of data on the Supreme Court's docket can be found in *United States Law Week*, the statistics section of each annual review of the previous Term found in the November issue of the *Harvard Law Review*, and the Supreme Court Judicial Data Base. On the latter, see generally Harold J. Spaeth & Jeffrey A. Segal, *The U.S. Supreme Court Judicial Data Base: Providing New Insights into the Court*, 83 JUDICATURE 228 (2000).

79. For an overview of the Supreme Court's certiorari policy, see HART & WECHSLER, *supra* note 5, at 1691-1714.

80. For an overview, see LAWRENCE BAUM, *THE SUPREME COURT* 117-22 (7th ed. 2001).

81. See Frank B. Cross, *The Justices of Strategy*, 48 DUKE L.J. 511, 558-59 (1998) (book

several Terms of the Rehnquist Court to the docket of several Terms of the Burger Court, when the latter was deciding almost twice as many cases.⁸² Hellman sought to test several of the hypotheses, including those mentioned above, for the recent decline.⁸³ In a comprehensive and thorough analysis, he concluded that none of the standard explanations for the decline had much persuasive force.⁸⁴ In developing his own explanation for the falling docket, Hellman wrote:

In short, the Justices who have joined in the Court in the last [ten] years take a substantially different view of the Court's role in the American legal system than the Justices of the 1980s. They are less concerned about rectifying isolated errors in the lower courts (except when a state-court decision threatens the supremacy of federal law), and they believe that a relatively small number of nationally binding precedents is sufficient to provide doctrinal guidance for the resolution of recurring issues.⁸⁵

For our purposes the qualification he makes is important, and I will return to it shortly. Before I do, it is worth mentioning that some authorities worried about the institutional capacity of the Supreme Court to review state court decisions on federal law, even before the recent decline. Writing in 1986, for example, Justice Brennan lamented:

One might argue that this Court's appellate jurisdiction over state-court judgments in cases arising under federal law can be depended upon to correct erroneous state-court decisions and to insure that federal law

review).

82. See Arthur D. Hellman, *The Shrunk Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403.

83. The hypotheses he tested were as follows:

1. The virtual elimination of the Supreme Court's mandatory appellate jurisdiction allows the Court to deny review in some cases that would have received plenary consideration under the pre-1988 regime.
2. After the retirement of its three most liberal Justices, the Court took fewer cases in which lower courts had upheld convictions or rejected civil rights claims.
3. Twelve years of Reagan-Bush judicial appointments brought greater homogeneity to the courts of appeals, resulting in fewer intercircuit conflicts that the Supreme Court had to resolve.
4. The Federal Government was losing fewer cases in the lower courts and therefore filed fewer applications for review in the Supreme Court.
5. The 12 years of Reagan-Bush appointments made the courts of appeals more conservative, resulting in fewer "activist" decisions of the kind that a conservative Supreme Court would choose to review.

Id. at 405.

84. *Id.* at 425.

85. *Id.* at 430-31 (footnote omitted).

is interpreted and applied uniformly. . . . [However,] having served on this Court for [thirty] years, it is clear to me that, realistically, it cannot even come close to “doing the whole job”⁸⁶

How often did the Court “do the job” prior to the recent decline of the entire docket? In the four decades prior to the 1990s, the Supreme Court reviewed on the average about thirty-seven cases from state courts per Term.⁸⁷ This was roughly twenty-five percent of the cases decided on the merits by the Court during that period (assuming an average docket each Term of about 150 cases). Not surprisingly, in the decade of decline fewer cases have come from state courts. As Table 1 indicates, the number of cases from state courts has fallen into the twenties or teens, and the percentage of total cases has fallen as well. Indeed, it appears that the sharp decline of state court cases reviewed has significantly, and perhaps disproportionately, contributed to the decline of the overall docket.⁸⁸

86. *Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804, 827 n.6 (1986) (Brennan, J., dissenting). In *Merrell Dow*, the majority held that a case based on state law that raised federal issues nevertheless did not “arise under” federal law for purposes of the general federal question statute, 28 U.S.C. § 1331 (1994); *Merrell Dow*, 478 U.S. at 807. Hence, the case could not be brought in federal district court as an original matter or removed from state to federal court as a federal question case. *See id.* Concerns about the uniformity of federal law, given that fifty state courts and no federal courts might be rendering disparate interpretations of federal law, were, according to the majority, ameliorated in part by the power the Court retained “to review the decision of a federal issue in a state cause of action.” *Id.* at 815-16. Justice Brennan was responding to that point.

87. I derived this estimate from data found in Richard A. Brisbin Jr. & John C. Kilwein, *U.S. Supreme Court Review of State High Court Decisions*, 78 JUDICATURE 33, 34 nn.5-6 (1994) (indicating that the Court decided 1370 cases from state supreme courts and lower state courts during the 1953-1990 Terms).

88. The declining number of state court cases reviewed may be attributable to changing personnel on the Court. Two liberal members of the Court, Justices Brennan and Marshall, might have been more cognizant of state court decisions denying asserted federal rights and perhaps more likely to vote to review such cases. These Justices retired in 1990 and 1991, respectively. Perhaps relatedly, these Justices (along with Justice Stevens) did not participate in the clerk pool, in which the other Justices shared their clerks in preparing memoranda that evaluated certiorari petitions. The clerks for the three other Justices prepared their own memoranda. Prior to 1991, when a pool memo recommended denial of a certiorari petition, it was possible that certiorari would nonetheless be granted, depending on the votes of the three non-pool Justices. This seems less likely after 1991, because the two replacement Justices, Souter and Thomas, joined the pool. Justice Stevens is the only non-pool member of the current Court. For a discussion of these points, linking them to the overall decline of the docket (though not specifically to the fewer state court cases being reviewed), see David M. O'Brien, *Join-3 Votes, the Rule of Four, the Cert. Pool, and the Supreme Court's Shrinking Plenary Docket*, 13 J.L. & POL. 779, 784, 790, 799-803 (1997). Thanks particularly to Evan Caminker for his insights on the internal dynamics of the Court during the 1989-91 period.

Table 1

Supreme Court Docket, 1989-1999 Terms: Subject Matter of Dispositions with Full Opinions

Term	State courts—civil actions	State courts—criminal cases	TOTAL	Total of cases for Term	Percentage of cases from state courts
1989	17	24	41	137	30%
1990	9	19	28	120	23%
1991	14	11	25	114	22%
1992	4	9	13	114	11%
1993	16	7	23	87	26%
1994	10	4	14	86	16%
1995	8	3	11	79	14%
1996	4	3	7	86	8%
1997	7	3	10	93	11%
1998	4	7	11	81	14%
1999	5	7	12	77	16%

Source: *Harvard Law Review*⁸⁹

B. The Supreme Court’s Monitoring of Federal Law in State Court

In the 1990s both the absolute and proportional number of cases from state courts reviewed on the merits by the Supreme Court has declined. What has been the effect of this decline on the adjudication of federal issues in state courts? The same question can be posed with regard to the development of federal law in the lower federal courts. Hellman has suggested that over the long run, a limited docket will create “the risk that the paucity of decisions will leave wide gaps in the doctrines governing important areas of law.”⁹⁰ Those gaps may make it difficult for federal and state lower court judges to resolve correctly or uniformly issues of federal law. Likewise, under a reduced docket, “[l]ower-court judges will no longer feel the spirit of goodwill and cooperation that comes

89. These statistics were compiled and calculated from volumes 104-114 of the *Harvard Law Review*’s annual review of Supreme Court statistics, Table II, Part E (Origins of Cases and Their Dispositions) and Table III (Subject Matter of Dispositions with Full Opinions).

90. Hellman, *supra* note 82, at 434.

from participation in a shared enterprise. Without that spirit, it is hard to see how a hierarchical judiciary can function effectively."⁹¹

Beyond these abstractions it is difficult to test in more detail how, if at all, the shrunken docket has affected adjudications in state courts. Indeed, it is too soon to tell, because the smaller docket is a relatively recent phenomenon, albeit one that has been consistent over the last decade. However, several sources of data can suggest some tentative conclusions on the effect of the recent docket.

One source of data could be the rate of reversal of state court decisions. If the rate of reversal of such decisions by the Supreme Court were relatively high, it might suggest that state courts were not doing a noteworthy job of adjudicating federal law. Over the past half-century, the average reversal rate by the Court for *all* cases has been about sixty percent.⁹² During the same time period, the Supreme Court reversed and/or remanded state supreme court decisions at a higher rate, about seventy percent.⁹³ Perhaps not surprisingly, the rate of reversal was particularly high during the Warren Court and was closer to the overall average during the Burger and Rehnquist Courts.

The data available for the 1990s is for the last three Terms, as set forth in Table 2. For those Terms, the overall reversal/vacate rate for all cases was about sixty-five percent. In the same time period, the same rate for state court cases was again higher, about seventy-three percent. This data might suggest that state courts have not been correctly applying federal law, as compared to their federal court counterparts. But any conclusion like this must be drawn with great caution, not only because of the small number of cases involved, but because reversal could be based on a variety of factors. The Supreme Court does not sit merely to correct errors—its primary function is law development.⁹⁴ If that were not the case, we might expect *all* cases accepted for review to be reversed.⁹⁵

91. *Id.* at 436-37.

92. See EPSTEIN ET AL., *supra* note 78, at 212 tbl.3-6 (Disposition of Cases, 1946-1994 Terms).

93. This figure was calculated from data supplied in Brisbin & Kilwein, *supra* note 87, at 34 tbl.1 (covering 1953-1990 Terms). The study only covered review of state supreme court decisions, not that of decisions of lower state courts, which for various reasons were not reviewed on the merits by the state high courts before reaching the Supreme Court. See *id.* at 34.

94. See SAMUEL ESTREICHER & JOHN SEXTON, REDEFINING THE SUPREME COURT'S ROLE: A THEORY OF MANAGING THE FEDERAL JUDICIAL PROCESS 47 (1986).

95. See Cross, *supra* note 81, at 560-61.

Table 2

Supreme Court Docket, 1997-1999 Terms: Source of Cases Disposed on the Merits

1997 Term

Lower court	Reversed	Vacated	Affirmed	TOTAL	Percent
federal	37	13	33	83	89%
state	5	2	3	10	11%
TOTAL	42	15	36	93	

1998 Term

Lower court	Reversed	Vacated	Affirmed	TOTAL	Percent
federal	35	14	21	70	86%
state	9	0	2	11	14%
TOTAL	44	14	23	81	

1999 Term

Lower court	Reversed	Vacated	Affirmed	TOTAL	Percent
federal	37	1	26	64	84%
state	8	0	4	12	16%
TOTAL	45	1	30	76	

Source: *Harvard Law Review*⁹⁶

The disposition of cases decided on the merits by the Supreme Court tells us something, but formally it is only the top rung of the appellate ladder. To get a better sense of the effect of the Court’s docket, ideally, we should examine *all* cases decided by lower courts. Only that examination would enable us to determine how well the Court supervises lower courts. A useful metaphor to frame our thinking here is to envision the Supreme Court as a manager. The metaphor has both normative and empirical force. Regarding the former, rather than accepting cases in a largely ad hoc way, the managerial Court would usually only accept a case for review if the issues raised have been thoroughly addressed in one or more cases below, and it would give more substantive content to the

96. These statistics compiled and calculated from *Harvard Law Review*’s annual review of Supreme Court statistics, Table II, Part E (Sources of Cases Disposed on the Merits) (first set forth for the 1997 Term).

“importance” criterion.⁹⁷ This managerial model also suggests ways in which to gauge empirically its workability. If we conceive the Supreme Court and the lower courts as having a principal-agent relationship, then we would be concerned with how the principal monitors its agents. Among other things, this suggests that we should examine the vast majority of lower court cases where Supreme Court review is either denied or not sought at all, to see whether those courts are nevertheless following Court precedent.⁹⁸

One way to test these models is to examine the concept of parity, meaning whether and to what extent state courts can and do fully and fairly adjudicate federal constitutional rights. Many aspects of federal jurisdiction doctrine are predicated, at least in part, on the existence of some notion of parity.⁹⁹ The concept is not without its critics. Most famously, Burt Neuborne declared parity to be a myth because many state judges face periodic election and thus are not as likely to enforce unpopular, counter-majoritarian rights as compared to their life-tenured counterparts.¹⁰⁰ The argument continues that federal judges are better qualified, trained, and have more institutional support than most state judges, so federal rights are apt to be better adjudicated and protected in federal court.¹⁰¹

Parity also has implications for the managerial and principal-agent models

97. See generally ESTREICHER & SEXTON, *supra* note 94, at 48-70.

98. The seminal work advancing this model is Donald R. Songer et al., *The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court-Circuit Court Interactions*, 38 AM. J. POL. SCI. 673 (1994).

In this Article, I am focusing primarily on the Supreme Court monitoring state courts by hearing appeals of cases directly from the latter. There are two other ways in which the Supreme Court could, in effect, monitor the decisions of state courts. One way is to review lower federal court disposition of federal habeas case petitions filed to overturn convictions obtained in state court where the conviction was tainted by violation of federal constitutional rights. Another way would be to review the disposition of federal civil rights cases filed in federal court that seek to have state court convictions or other processes set aside as violative of federal law. Relatively speaking, few such cases are filed, and various doctrinal and statutory barriers prevent either avenue from being a significant check on state courts. See Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 636 n.68 (1981) (discussing various reasons why “federal habeas corpus [cannot] simply be characterized as an alternate form of federal appellate review”). This is not to say that these avenues play no role at all. For example, federal habeas cases, many of which have been reviewed by the Supreme Court, have served as a significant monitor of death penalties handed down in state courts. See SOLIMINE & WALKER, *supra* note 2, at 123-24; Joseph L. Hoffmann, *Substance and Procedure in Capital Cases: Why Federal Habeas Courts Should Review the Merits of Every Death Sentence*, 78 TEX. L. REV. 1771 (2000). A full discussion of these avenues is beyond the scope of the present paper. For general discussion, see Joseph L. Hoffmann & Lauren K. Robel, *Federal Court Supervision of State Criminal Justice Administration*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 154 (1996).

99. See JESSE H. CHOPER ET AL., CONSTITUTIONAL LAW 47 n.1 (9th ed. 2001); SOLIMINE & WALKER, *supra* note 2, at 29-34; Note, *Powers of Congress and the Court Regarding the Availability and Scope of Review*, 114 HARV. L. REV. 1551, 1552 n.12 (2001).

100. Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1105, 1127-28 (1977).

101. *Id.* at 1121-22.

of Supreme Court review. If parity were not a viable concept, it would suggest (among other things) that the Court is unable to perform its monitoring role particularly well. There is a growing literature testing some of the claims of parity. Some have questioned the assumptions of critics like Neuborne, observing, for example (as noted in Part I), that state judicial elections rarely perform the posited majoritarian check. Several studies have compared the adjudication of specific federal constitutional rights in federal and state courts.¹⁰² While studies are ongoing and do not all point in one direction, in my view, it is fair to say that most of these studies show that, overall, state courts as compared to federal courts are not systematically under-enforcing federal rights.

This is not to say that in contemporary America all federal rights enjoy the fullest protection in state courts; consider the administration of the death penalty by state courts. Recent studies by James Liebman and others demonstrate that well over one-half of capital sentences handed down in state courts are initially overturned in some manner by a later reviewing court.¹⁰³ Because denial of federal constitutional rights is often the source of error, the high rate of reversal undermines notions of parity. To some, it is evident that elected state judges, beholden to voters in favor of the death penalty, improperly deny the federal rights of capital defendants.¹⁰⁴ There is evidence supporting this concern,¹⁰⁵ but it must be tempered by the realization that many state actors (e.g., prosecutors, defense counsel), not just judges, are also potential sources of error.¹⁰⁶ Moreover, it is worth noting that the high error rate is due in significant part to *state* appellate courts identifying and reversing error in trial courts.¹⁰⁷

Some recent studies of state court decision-making, in part, examined the Supreme Court's monitoring ability. One study examined a sample of search and

102. For an overview of the literature up to 1998, see SOLIMINE & WALKER, *supra* note 2, at 42-55. For more recent studies, see Brett Christopher Gerry, *Parity Revisited: An Empirical Comparison of State and Lower Federal Court Interpretations of Nollan v. California Coastal Commission*, 23 HARV. J.L. & PUB. POL'Y 233 (1999) (discussing Takings Clause cases); William B. Rubenstein, *The Myth of Superiority*, 16 CONST. COMMENT. 599 (1999) (discussing gay rights cases); Daniel R. Pinello, *The Myth of Parity Revisited: An Empirical Test of Whether Federal Courts Protect Rights More Vigorously than State Courts*, Paper Presented at Annual Meeting of the Midwest Political Science Association, Chicago, Ill. (Apr. 19-22, 2001) (on file with author).

103. See James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 TEX. L. REV. 1839, 1853-54 (2000).

104. See, e.g., Stephen B. Bright, *Elected Judges and the Death Penalty in Texas: Why Full Habeas Corpus Review by Independent Federal Judges Is Indispensable to Protecting Constitutional Rights*, 78 TEX. L. REV. 1805, 1805 (2000); Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 760 (1995).

105. See SOLIMINE & WALKER, *supra* note 2, at 118-19 (reviewing studies).

106. See *id.* at 115; John Blume & Theodore Eisenberg, *Judicial Politics, Death Penalty Appeals, and Case Selection: An Empirical Study*, 72 S. CAL. L. REV. 465, 468 (1999); James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2032 (2000).

107. See Liebman et al., *supra* note 103, at 1847-48; see also Barry Latzer & James N. G. Cauthen, *Capital Appeals Revisited*, 84 JUDICATURE 64, 66-67 (2000) (reporting data on reversal of capital case convictions or sentences by state supreme courts from 1990 to 1999).

seizure cases from state supreme courts from 1961-1990.¹⁰⁸ Compliance with Supreme Court doctrine over the same period was tested by, among other things, coding the results and fact patterns in both Supreme Court and state high court cases.¹⁰⁹ The study found substantial compliance with Supreme Court doctrine, indeed as much compliance as in similar cases between the Supreme Court and the U.S. Court of Appeals.¹¹⁰ A methodologically similar study has been done of cases in state supreme courts concerning the legality of confessions to the police.¹¹¹ It, too, concluded that the results of the cases substantially mirrored the results of similar cases in the Supreme Court over the same time period.¹¹²

C. *Supreme Court Monitoring in the Twenty-First Century*

More empirical work needs to be done to examine the development of federal law in state courts.¹¹³ Nonetheless, the studies discussed above do suggest that, by and large, state courts (or at least state high courts) comply with Supreme Court precedent. Does this necessarily mean that the Supreme Court is acting as an effective monitor of state courts? It is difficult to say. The vast majority of these state court decisions, of course, are not reviewed by the Court. While the possibility of any given state court decision being reviewed is quite low, it would seem that the threat of review and possible reversal by the Supreme Court nonetheless plays a role.¹¹⁴ Still, those possibilities are so remote, it would seem that the simple norm of following Supreme Court precedent is the principal compelling force.

To what extent does a shrunken or expanded docket of the Supreme Court affect its monitoring role? This, too, is difficult to say. With regard to reviewing decisions of state courts, in my view, it does not make a quantum difference

108. Wendy L. Martinek, *Judicial Impact: The Faithfulness of State Supreme Courts to the U.S. Supreme Court in Search and Seizure Decision Making*, Paper Presented at Annual Meeting of the American Political Science Association, Atlanta, Ga. (Sept. 2-5, 1999) (on file with author).

109. *Id.* at 10-14 (explaining research design).

110. *Id.* at 14-17 (reporting results). For the similar study of search and seizure cases examining compliance by the U.S. Courts of Appeals, see Songer et al., *supra* note 98.

111. See Benesh & Martinek, *supra* note 42.

112. *Id.* at 23, 26-27 (discussing results on this issue).

113. Most of the studies so far have focused on the decisions of state high courts, not state trial courts or intermediate appellate courts. The focus is understandable, given that empirical study of lower court decisions is more difficult, as their decisions and opinions are less accessible to researchers. Even the studies of state high courts have usually focused on one or two specific federal rights. Study of state supreme court decision-making on the parity issue will be facilitated by a recently developed online database that codes all decisions of such courts for several years in the 1990s. The database is described in Paul Brace & Melinda Gann Hall, *Comparing Courts Using the American States*, 83 JUDICATURE 250 (2000).

114. See SOLIMINE & WALKER, *supra* note 2, at 57; John C. Kilwein & Richard A. Brisbin, Jr., *Policy Convergence in a Federal Judicial System: The Application of Intensified Scrutiny Doctrines by State Supreme Courts*, 41 AM. J. POL. SCI. 122, 131 (1997); see also Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817 (1994).

whether the docket is shrunken or not. Even in the heyday of the expanded docket, only a small percentage of state court decisions susceptible to review were reviewed. To be sure, severely downsizing the docket at some point will limit the ability of the Court to monitor state courts. Perhaps the Court's current docket approaches that limit. Future Courts in this century may well re-expand the docket, but even if they do, it seems doubtful that the docket will go beyond the 150 case average of most Terms in the past century.

Whether under an expanded or shrunken docket, available evidence seems to indicate that the Supreme Court has been able, to a tolerable degree, to carry out the monitoring function. Data from the Terms before the shrunken docket indicates (not surprisingly) that cases from more densely populated states were more likely to appear on the docket, as did decisions from state supreme courts in the deep South during the Civil Rights Era.¹¹⁵ Even during the current diminished docket, Hellman concludes that, as compared to earlier Terms, the Court has continued to accept certiorari petitions from litigants asserting federal rights in state court cases.¹¹⁶ Hellman optimistically concludes that:

In this respect, however, the Court is simply going back to its roots. From the earliest days of the nation's history, no function of the Court has ranked higher than the protection of federal rights from hostility or misunderstanding on the part of state courts. We would not expect the Court to break with that tradition, and it has not.¹¹⁷

The creation of the Supreme Court's docket does not operate in a vacuum. Certiorari petitions are not filed in all cases that in theory could be reviewed by the Supreme Court. Though available data is nowhere near definitive, it would seem that important decisions (under any definition of that term), or decisions that arguably depart significantly from federal law, will usually be appealed.¹¹⁸ When many petitions are before the Justices each Term, compelling evidence suggests that they rely heavily on certain cues in deciding whether to accept the petition. Among these cues are conflicts between federal and state courts on the issue at hand and amicus curiae briefs filed by various organizations on behalf of or against the petition.¹¹⁹ In these ways, litigants and interest groups play a significant role in shaping the Court's docket. Litigants and interest groups can thus aid the Supreme Court in its monitoring activity.

115. EPSTEIN ET AL., *supra* note 78, at 672-73 tbl.7-34 (State and Territorial Court Decisions Affirmed by the Vinson, Warren, Burger, and Rehnquist Courts); Brisbin & Kilwein, *supra* note 87, at 38-39.

116. See Hellman, *supra* note 82, at 428.

117. *Id.* (footnote omitted).

118. The decision to appeal, in general, is an understudied phenomenon. For a discussion of the small amount of literature and how it supports, to a degree, the statements made in the text, see SOLIMINE & WALKER, *supra* note 2, at 44 & n.47.

119. For a review of the considerable literature documenting the Supreme Court's apparent use of cues to decide which certiorari petitions to accept, see BAUM, *supra* note 80, at 109-17.

III. THE ROLE OF STATE INTERMEDIATE APPELLATE COURTS

So far, I have said nothing explicit about state intermediate appellate courts (IACs). Like virtually all of the literature on the issues discussed in Parts I and II of this Article, I have almost exclusively addressed state high courts. This silence is unintentionally reflective of much of the scholarly literature on state courts, which focuses on state supreme courts and trial courts, not state IACs.¹²⁰ This lack of attention is particularly unfortunate and inappropriate, because, as one writer put it, "IACs have become the draft animals of state appellate review. . . ."¹²¹ The point was that IACs, not high courts, dispose of the vast majority of cases that are appealed within state court systems. Keeping with this theme, state IACs did not play a role in the *Bush I* or *Bush II* cases. In both cases, the state IACs of Florida were bypassed and the appeals from trial court decisions were certified directly by the IACs to the Florida Supreme Court.¹²²

The relative lack of attention to state IACs is unfortunate for several reasons. As of 1995, some thirty-nine states had established IACs.¹²³ The jurisdiction of most IACs is mandatory, i.e., they hear appeals as of right, compared to state supreme courts' discretionary control over almost all of their dockets. So state IACs, like the U.S. Courts of Appeals in the federal system, dispose of the vast majority of appellate cases. Typically only a small percentage is thereafter reviewed on the merits by state supreme courts. State IACs were established in part to lessen the caseload demands on state high courts. As already stated, they rule on the vast number of appeals from state trial courts, primarily to correct error. In effect they screen out cases for the state high courts, enabling the latter (in conjunction with their discretionary jurisdiction) to better engage in their law development role.¹²⁴ The screening and channeling function of state IACs should

120. See LAWRENCE BAUM, *THE PUZZLE OF JUDICIAL BEHAVIOR* 28 (1997) ("Social scientists have written relatively little about state intermediate appellate courts."); HARRY P. STUMPF, *AMERICAN JUDICIAL POLITICS* 349 n.6 (2d ed. 1998) ("State intermediate appellate courts are discussed in a number of publications, although much is still unknown regarding their operations."). As one example of this lack of attention, consider an oft-cited book of essay reviews by different political scientists on various aspects of federal and state courts: *THE AMERICAN COURTS* (John B. Gates & Charles A. Johnson eds., 1991). This volume has essays on, among other things, all three levels of courts in the federal system, state supreme courts, and state trial courts, but no chapter on state IACs.

Good summaries of the limited literature on state IACs are found in DANIEL J. MEADOR ET AL., *APPELLATE COURTS* 236-55, 349-91 (1994); STUMPF, *supra*, at 349-56.

121. STUMPF, *supra* note 120, at 352.

122. See *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70, 74-75 (2000) (per curiam) (discussing state appellate procedure in case); *Bush v. Gore*, 531 U.S. 98, 101 (2000). For a brief discussion of the certification process in state courts, see MEADOR ET AL., *supra* note 120, at 380.

123. SOLIMINE & WALKER, *supra* note 2, at 45 n.48 (citing ROBERT A. CARP & RONALD STIDHAM, *JUDICIAL PROCESS IN AMERICA* 69-72 (4th ed. 1998)).

124. See STUMPF, *supra* note 120, at 349; see also COMM. ON STANDARDS OF JUDICIAL ADMIN., AM. BAR ASS'N, *MODEL JUDICIAL ARTICLE* § 3 (1995) (recommending that IACs be established); COMM'N ON STANDARDS OF JUDICIAL ADMIN., AM. BAR ASS'N, *STANDARDS RELATING TO COURT ORGANIZATION* § 1.13 (1974) (discussing reasons for establishing IACs).

lead to better decision-making by the state supreme courts in the cases the latter review.¹²⁵

Despite the fact that IACs played no role in the *Bush* litigation, a significant number of state court cases reviewed by the Supreme Court have been IAC decisions in which the state supreme court declined review.¹²⁶ Some of these decisions have been historically significant. Two important constitutional law cases, *Terry v. Ohio*¹²⁷ and *Brandenburg v. Ohio*¹²⁸ were both reviews of Ohio IAC decisions. In both instances the Ohio Supreme Court dismissed the appeals. Several cases in the 2000 Term of the Supreme Court are reviews of state IAC decisions.¹²⁹

To what extent do state IACs play a different role than state high courts with regard to issues addressed in the previous parts of this Article? One possible difference involves use of the plain statement rule of *Michigan v. Long*.¹³⁰ Any state court presumably is in a position to indicate clearly whether state law is being relied upon. Nonetheless, it would seem awkward for lower state courts to make those statements, given that state supreme courts are the final expositors of state law. Thus, if the state high court has not yet passed on whether a particular state constitutional provision will be interpreted more expansively than the analogous federal constitutional right, the IAC faces the issue without guidance from the high court. It would seem that in such circumstances, the IAC could address the issue, but my guess is that in most instances an IAC would defer to the supreme court.¹³¹ On the other hand, if the supreme court had previously addressed the state constitutional issue, then the IAC would, and indeed should be, in a position to issue definitively a plain statement (or not).¹³²

125. For empirical evidence, albeit dated, supporting some of the assertions in the text, see Burton M. Atkins & Henry R. Glick, *Environmental and Structural Variables as Determinants of Issues in State Courts of Last Resort*, 20 AM. J. POL. SCI. 97, 112 (1976) (finding inter alia that presence of IACs is associated with the state supreme court deciding fewer routine, private law cases and more public law cases, both civil and criminal). *But cf.* Benesh & Martinek, *supra* note 42, at 24-25 (finding no correlation between presence or absence of an IAC and the state supreme court faithfully following Supreme Court doctrine in confession cases).

126. According to a study of the Supreme Court's docket in the 1953-1990 Terms, of the 1370 cases from state courts, 416 of those (about thirty percent) were from state IACs or trial courts. See Brisbin & Kilwein, *supra* note 87, at 34 nn.5-6.

127. 392 U.S. 1 (1968).

128. 395 U.S. 444 (1969) (per curiam).

129. See *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001) (reviewing Maryland state IAC); *Illinois v. McArthur*, 531 U.S. 326 (2001) (reviewing Illinois state IAC); *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278 (2001) (reviewing Wisconsin state IAC).

130. 463 U.S. 1032 (1983).

131. For discussion of the options available to state lower courts in this and similar situations, see Bruce Ledewitz, *The Role of Lower State Courts in Adapting State Law to Changed Federal Interpretations*, 67 TEMP. L. REV. 1003 (1994).

132. Some light on these issues is shed by a now-dated study of the use of plain statements by state courts. See Felicia A. Rosenfeld, Note, *Fulfilling the Goals of Michigan v. Long: The State Court Reaction*, 56 FORDHAM L. REV. 1041 (1988). Although the study does not expressly address the issue, a few of the cases discussed and cited were from IACs. The vast majority of cases were

As noted, state trial courts and state IACs will be disposing of the vast majority of cases dealing with federal issues in state courts. Of the three levels of state courts, it is possible that state IACs generally raise the least concerns about the alleged lack of parity. Electoral accountability would seem most pertinent for those judges most visible to the public: state high court justices and trial court judges. Relatively speaking, state IAC judges might tend to be the most independent of the three levels. They are distant and abstract from the actual adjudication under review, yet, also have a distance from the electorate as compared to members of elected state supreme courts. I advance this hypothesis with some caution, because most of the literature on parity focuses on state high courts, not lower courts.¹³³

Another possibly different role for IACs is ascertaining what is federal law. Of course it is easy enough when the United States Supreme Court has directly spoken to an issue. But what if the Supreme Court has not? In that situation, what precedential weight, if any, should be given to the decisions of federal judges on the issue, whether in or outside of that state? Most state courts have not directly addressed this issue. It appears, however, that most state courts, at least implicitly, will accord federal court decisions some precedential weight in these circumstances, but do not consider themselves bound by the lower federal court decisions.¹³⁴ This inquiry is difficult enough for a state high court, but consider the additional complications faced by the judges on a state IAC. What if the lower federal courts and the state high court disagree on an issue of federal law? Various IACs from different states are split on the issue.¹³⁵ Donald Zeigler has rightly pointed out that “[l]ower state courts are in an extremely difficult position here.”¹³⁶ Norms of state decisions in a hierarchical judicial system strongly push an IAC to follow the state supreme court’s declaration of federal law, if available. But given the truism that the Supremacy Clause¹³⁷ binds all parts of the federal and state governments, including state IACs, it would seem to follow that an IAC could justifiably depart from a state supreme court holding if the overwhelming weight of authority (from lower federal courts and from other states’ courts) was to the contrary.¹³⁸

CONCLUSION

By any measure, the vast majority of cases raising federal issues are litigated in state courts, not federal courts. That adjudication takes place in the shadow

from state supreme courts, however.

133. See SOLIMINE & WALKER, *supra* note 2, at 45 n.48.

134. See, e.g., *State v. Burnett*, 755 N.E.2d 857 (Ohio 2001). For an excellent and comprehensive discussion of this issue, see Donald H. Zeigler, *Gazing into the Crystal Ball: Reflections on the Standards State Judges Should Use to Ascertain Federal Law*, 40 WM. & MARY L. REV. 1143 (1999).

135. For discussion of, and citations to, various cases on point, see Zeigler, *supra* note 134, at 1160-62.

136. *Id.* at 1221.

137. U.S. CONST. art. VI, cl. 2.

138. See Zeigler, *supra* note 134, at 1221-22.

of review by the final expositor of federal law, the United States Supreme Court. In other words, the Supreme Court monitors the development of federal law in state courts. In this Article, I have addressed two potential problems with the monitoring function: ascertaining whether a particular state court decision presents a federal issue capable of being reviewed, and the implication of the recent diminishing docket of the Supreme Court.

The first problem should not be of much concern. It is easy for a state court to declare whether or not its decision is based on reviewable federal law or (usually) unreviewable state law. The interpretative rule established by the Supreme Court in *Michigan v. Long*, in my view, serves both the Court and state courts well. The second problem is more troublesome. The Supreme Court never has and never will be able to review more than a small percentage of the cases from state courts where direct review is sought. Even so, the Court's monitoring role may be sorely tested if few cases from state courts are consistently reviewed. Although a cause for concern, it should not be a cause of despair. Contemporary evidence demonstrates that, for the most part, state courts are faithful agents of the Supreme Court in applying federal law. Faithful agents need to be monitored, but not as closely as unfaithful ones.

SUPREME COURT MONITORING OF STATE COURTS IN THE TWENTY-FIRST CENTURY:

A RESPONSE TO PROFESSOR SOLIMINE

JEFFREY W. GROVE*

In the preface to their recent book, *Respecting State Courts*, Professor Solimine and his co-author refer to themselves by describing one as the “more leftist of the two” and the other as the “more centrist of the two,” without explicitly identifying who is who.¹ Having read Professor Solimine’s symposium paper,² I assume he is the “more centrist.” His views are nuanced and balanced, not the products of an ideological agenda, and I agree with much of what he has to say. In this response, however, I will highlight the areas in which our analyses or emphases—if not always our basic conclusions—appear to differ.

I. THE PLAIN STATEMENT RULE

In the well-known formulation of *Michigan v. Long*,³ the U.S. Supreme Court held:

[W]hen . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.⁴

The Supreme Court, therefore, cast on state courts the obligation clearly to demonstrate whether their decisions are grounded in state law rather than federal law.

State judges, who clearly elaborate adequate and independent state law grounds, when they exist, can effectively insulate their decisions from possible reversal by the U.S. Supreme Court. It seems to me obvious, as it is to Professor Solimine,⁵ that state judges who intend to rely on an independent state law ground of decision can easily do so by straightforward compliance with the plain statement rule of *Michigan v. Long*. Moreover, because compliance is easily achieved, this rule reflects a salutary respect for state courts and their

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1. MICHAEL E. SOLIMINE & JAMES L. WALKER, *RESPECTING STATE COURTS: THE INEVITABILITY OF JUDICIAL FEDERALISM*, at xi (1999).

2. Michael E. Solimine, *Supreme Court Monitoring of State Courts in the Twenty-first Century*, 35 IND. L. REV. 335 (2002).

3. 463 U.S. 1032 (1983).

4. *Id.* at 1040-41.

5. Solimine, *supra* note 2, at 341.

applications of state law. In addition to the examples of plain statements cited by Professor Solimine,⁶ the opinion of Judge Edward Najam of the Indiana Court of Appeals in *State v. Gerschoffer*⁷ provides a model application of the plain statement rule. Having surveyed federal decisional law relevant to the constitutionality of sobriety checkpoints under the Fourth Amendment, Judge Najam cautioned: "Decisions of the Supreme Court and other federal courts . . . may be persuasive, 'but Indiana courts should grant neither deference, nor precedential status to such cases when interpreting provisions of our own constitution.'"⁸ He concluded:

In sum, Article I, Section 11 of the Indiana Constitution prohibits police stops of motorists except on the reasonable suspicion required by [cited Indiana cases] We hold, therefore, that a sobriety checkpoint such as the one at issue here, which is conducted absent probable cause or reasonable suspicion of illegal activity, constitutes an unreasonable seizure as proscribed by Article I, Section 11.⁹

A clearer application of the plain statement rule in the service of state law would be difficult to formulate.

The plain statement rule also honors and protects the Supreme Court's role as the final expositor of federal law. As Professor Solimine observes, by assuming, that ambiguous state court opinions are predicated on federal law, *Long* permits "more review of state court decisions bearing on federal law . . . [and] will in theory lead to greater uniformity of federal law."¹⁰ However, he expresses only faint praise for the value of uniformity, characterizing it as "unobjectionable enough" but cautioning that it should not be made a "fetish."¹¹

In my judgment, uniformity—or at least an increased potential for uniformity of federal law—is a value of the first rank. Of course, no one thinks that perfect uniformity is possible. At any given time dozens of circuit court splits on issues of federal law persist within the federal judicial system itself. Indeed, uniformity may even be undesirable if achieved too precipitously, before the competing visions of federal law, which produced disuniformity, have been carefully considered and fully matured in state appellate courts and lower federal courts. Still, if *Long* increases the number of cases eligible for review, it maximizes the Supreme Court's flexibility in managing its docket by providing the Court with more opportunities to identify the appropriate cases for resolving important federal issues and establish uniformity where it may be most needed.

The hostile reaction of some commentators to the decision in *Long* was, no doubt, driven by the result in the case: the Court *reversed* the Michigan Supreme Court's decision *upholding* the defendant's claim of a Fourth Amendment right

6. *Id.* at 341-42 n.33.

7. 738 N.E.2d 713 (Ind. Ct. App. 2000).

8. *Id.* at 720 (citations omitted).

9. *Id.* at 726 (footnote omitted).

10. Solimine, *supra* note 2, at 341.

11. *Id.* (footnote omitted).

to exclusion of incriminating evidence. Specifically, *Long* has been criticized on the basis that the Supreme Court simply should not review state court decisions that over-enforce federal rights.¹² This, indeed, was the centerpiece of Justice Stevens' dissenting opinion in the case.¹³

Professor Solimine finds the "over-enforcement" argument unpersuasive in a structural sense: "In our hierarchical system of courts, it has long been the norm that appellate courts will review the actions of lower courts. The norm has a long pedigree for Supreme Court review of state courts."¹⁴ True enough. But beyond this truism, I discern a more fundamental reason for rejecting the "over-enforcement" criticism.

A state court's *misapplication* of federal law should be neither subject to, nor insulated from, Supreme Court review based on the result produced. Why an obviously erroneous application of federal law should be regarded as tolerable is not obvious. Indeed, if uniformity of federal law is important at all, surely disuniformity resulting from misapplication of settled federal law is more egregious than disuniformity which exists because a definitive resolution of a federal law issue has not yet been obtained. However, if a state court identifies protections of individual rights in its *own* law that enhance those afforded by federal law, that is unobjectionable in a federalism sense and may be desirable from an individual rights perspective. Judge Najam's opinion for the Indiana Court of Appeals in the *Gerschoffer* case¹⁵ is a recent example of such an approach.

It is not easy to explain why many state courts have not availed themselves of the opportunity presented by *Long* to rely on available state law, although Professor Solimine rehearses some plausible explanations.¹⁶ Whatever the reasons, however, it appears that the plain statement rule "has had relatively little effect on state court decision-making."¹⁷

II. *BUSH I* AND *II*

I turn now to Professor Solimine's discussion of the impact of *Bush v. Palm Beach County Canvassing Board (Bush I)*¹⁸ and *Bush v. Gore (Bush II)*.¹⁹ In his view, "the Supreme Court reviewing these purportedly state-law-based decisions was unremarkable, given precedent, and it is unlikely to be an omen for more

12. See, e.g., Robert C. Welsh, *Reconsidering the Constitutional Relationship Between State and Federal Courts: A Critique of Michigan v. Long*, 59 NOTRE DAME L. REV. 1118 (1984).

13. *Michigan v. Long*, 463 U.S. 1032, 1067-69 (1983) (Stevens, J., dissenting).

14. Solimine, *supra* note 2, at 340. (footnote omitted).

15. *State v. Gerschoffer*, 738 N.E.2d 713 (Ind. Ct. App. 2000); *supra* notes 7-9 and accompanying text.

16. Solimine, *supra* note 2, at 342.

17. *Id.* at 340.

18. 531 U.S. 70 (2000).

19. 531 U.S. 98 (2000).

aggressive Supreme Court review in the future.”²⁰ As a confirmed waffler, I admire his courage in staking out these definitive—and perhaps contrarian—positions. If, however, the Internet listservs to which I subscribe fairly represent the views of most academic lawyers, these two Supreme Court decisions were *remarkable* departures from prior practice. They signal the Court’s willingness, or at least the willingness of certain “unprincipled” Justices, to exercise the power of judicial review as aggressively as may be deemed necessary in future cases. The word “alarmist” comes to mind.

Professor Solimine concludes that the Supreme Court’s remand in *Bush I* did not implicate *Michigan v. Long* because the Florida Supreme Court’s opinion was ambiguous about the *state law* ground of decision and not about whether the opinion was grounded in federal or state law.²¹ I think this is a fair characterization. Although the Supreme Court’s remand did invite clarification of “the consideration the Florida Supreme Court accorded to 3 U.S.C. § 5,”²² it was not to determine whether the federal statute was the *ratio decidendi*. Rather, the purpose of clarification was to determine the extent to which the Florida Supreme Court had construed its *own* election code in light of the “safe harbor” provision in the federal statute.²³

As for *Bush II*, Professor Solimine believes that “properly understood” it “works no change in existing doctrine.”²⁴ Presumably, this is in reference to “the propriety of the Supreme Court reexamining state law on its own terms, even when expounded by the state’s highest court.”²⁵

The concurring opinion of Chief Justice Rehnquist, joined by Justices Scalia and Thomas, found that the Florida Supreme Court had misapplied state law because “[t]he scope and nature of the remedy ordered by the Florida Supreme Court jeopardizes the ‘legislative wish’ [of Florida’s legislature] to take advantage of the safe harbor provided by 3 U.S.C. § 5.”²⁶ The Chief Justice went on to say that “in light of the legislative intent identified by the Florida Supreme Court to bring Florida within the ‘safe harbor’ provision of 3 U.S.C. § 5, the remedy prescribed by the Supreme Court of Florida cannot be deemed an ‘appropriate’ one It significantly departed from the statutory framework in place”²⁷ In her dissenting opinion, Justice Ginsburg condemned the Chief Justice’s rejection of the Florida Supreme Court’s interpretation of Florida law, insisted that greater deference should be given to the Florida Supreme Court’s construction of its own election law, and regarded the cases relied on in the concurring opinion as inapposite.²⁸

20. Solimine, *supra* note 2, at 344.

21. *Id.* at 345.

22. *Bush I*, 531 U.S. at 78.

23. *Id.* at 77-78.

24. Solimine, *supra* note 2, at 347.

25. *Id.*

26. *Bush v. Gore (Bush II)*, 531 U.S. 98, 120-21 (2000) (Rehnquist, C.J., concurring).

27. *Id.* at 122.

28. *Id.* at 136, 140-41 (Ginsburg, J., dissenting).

Although unpersuaded by Justice Ginsburg's attempt to distinguish the cases cited in the concurring opinion, Professor Solimine seems to approve her call for greater deference.²⁹ With respect to the *level* of deference which is appropriate, he says:

From the standpoint of utilizing precedent, this is perhaps the most problematic aspect of the jurisdictional basis of *Bush II*. Even on these narrow points, only opinions joined by four Justices were fully engaged on the issue, and only the concurring opinion undertook what arguably undeferential reexamination of state law.³⁰

The different conclusions reached by Chief Justice Rehnquist and Justice Ginsburg do reflect different levels of deference in this case. Given the *state* legislative authority conferred by Article II, Section 1, Clause 2, the Chief Justice argued that "the text of the election law itself, and not just its interpretation by the courts of the States, takes on independent significance."³¹ Justice Ginsburg said that "Article II does not call for the scrutiny undertaken by this Court."³²

As I read these opinions, however, I think the operative difference in approach has less to do with deference and much more to do with underlying and contrasting views about the *adequacy* of the Florida Supreme Court's construction of Florida law. Terming its remedy "inappropriate," Chief Justice Rehnquist essentially concluded that the Florida Supreme Court's interpretation of the Florida election law was an inadequate state law ground of decision because it "significantly departed from the statutory framework in place" on the date of the election and was inconsistent with the intent of the Florida legislature—which the Florida Supreme Court had itself identified—to bring Florida within the "safe harbor" provision of 3 U.S.C. § 5.³³ By contrast, Justice Ginsburg accepted the Florida Supreme Court's view that "counting every legal vote was the overriding concern of the Florida Legislature"³⁴ regarding this as an adequate state law basis for the recount remedy ordered.

These two opinions, in which seven Justices joined—three in concurrence and four in dissent—portray important differences on the issue of the adequacy of a state law ground of decision where federal interests are arguably implicated, and to a lesser extent, on the related issue of the level of deference owed by federal courts to a state high court's construction of the state law in question. These differences may be problematic strictly in terms of precedential value, but they are real and should not be discounted.

Finally, in *Bush II* seven members of the Supreme Court (not simply a "five-member majority" to which Professor Solimine refers)³⁵ agreed that the Equal

29. Solimine, *supra* note 2, at 349.

30. *Id.*

31. *Bush II*, 531 U.S. at 113 (Rehnquist, C.J., concurring).

32. *Id.* at 142 (Ginsburg, J., dissenting).

33. *Id.* at 122 (Rehnquist, C.J., concurring).

34. *Id.* at 141 (Ginsburg, J., dissenting).

35. Solimine, *supra* note 2, at 345.

Protection Clause of the Fourteenth Amendment was violated by the varying standards and processes by which the manual recounts ordered by the Florida Supreme Court would be conducted in different counties. Of course, two of these seven members, Justices Souter and Breyer, would have remanded the case to the Florida courts “with instructions to establish uniform standards for evaluating the several types of ballots that have prompted differing treatments.”³⁶ I do not think Professor Solimine has expressed a view about what this expanded constitutionalization of the right to vote may mean in future election cases, and I am not sure I know what to think. In one of the first published scholarly analyses of *Bush II*, the authors ventured that “there is nothing in the Court’s opinion that suggests any reason the Equal Protection concerns it announces are limited to Presidential elections, nor is there any reason to think these concerns should be limited to that one electoral context.”³⁷ Sometimes, however, context is everything, and *Bush II* may be seen over time as a *sui generis* election case.

III. THE SUPREME COURT’S SHRUNKEN DOCKET

I will touch only lightly on Professor Solimine’s discussion of the Supreme Court’s shrunk docket, which has been well documented and its implications for the Supreme Court’s monitoring of state courts. Consistent with the overall reduction in the numbers of cases decided by the Supreme Court in more recent years, the percentage of state court cases disposed of with full opinions has declined from thirty percent in 1989 to sixteen percent in 1999.³⁸ In terms of Supreme Court oversight, however, this reduction may not be problematic. Based on studies Professor Solimine has examined (and I have not), he tentatively concludes that “by and large, state courts (or at least state high courts) comply with Supreme Court precedent.”³⁹ The good news, then, is that “[w]hether under an expanded or shrunk docket, available evidence seems to indicate that the Supreme Court has been able ‘to a tolerable degree’ to carry out the monitoring function.”⁴⁰ For those of us who believe that state courts are competent to decide federal law issues and, in general, are faithfully committed to following Supreme Court precedents, these conclusions are reassuring.⁴¹

36. *Bush II*, 531 U.S. at 134 (Souter, J., dissenting).

37. SAMUEL ISSACHAROFF ET AL., WHEN ELECTIONS GO BAD: THE LAW OF DEMOCRACY AND THE PRESIDENTIAL ELECTION OF 2000, at 48 (2001).

38. Solimine, *supra* note 2, at 353 tbl.1.

39. *Id.* at 358.

40. *Id.* at 359.

41. Like Professor Solimine, my legal career began with a federal judicial clerkship. My clerkship was with Judge Ruggero Aldisert of the Third Circuit Court of Appeals, and my earliest views on the parity of state and federal courts were influenced by my work with him. Judge Aldisert’s earlier experience as a state court trial judge informed his commitment to a truly federalist allocation of power between the national courts and state courts. He was troubled, for example, by what he saw as an “infatuation with federal courts as the preferred forum for litigation.” Ruggero J. Aldisert, *Judicial Expansion of Federal Jurisdiction: A Federal Judge’s Thoughts on*

IV. STATE INTERMEDIATE APPELLATE COURTS

Now, what can be said about state intermediate appellate courts in particular? Professor Solimine cites one characterization of intermediate appellate courts: “the draft animals of appellate review.”⁴² Others have termed the job of intermediate appellate courts “donkey work.”⁴³ I take these characterizations to be less than felicitous ways of making the point that an overwhelming majority of the cases appealed within state court systems are resolved by their intermediate appellate courts. For example, in 1999 the Indiana Court of Appeals, composed of fifteen judges, decided 2220 appeals by written opinion, for an average of 148 opinions per judge (not counting dissenting or concurring opinions).⁴⁴ During the same period, the Indiana Supreme Court, composed of five justices, issued written opinions in 216 cases, for an average of forty-three opinions per justice.⁴⁵ In other words, judges of the Indiana Court of Appeals issued over ten times more written opinions in total and over three times more opinions per judge than justices of the Indiana Supreme Court.

It is common place that state intermediate appellate courts, whose jurisdiction is generally non-discretionary (thus explaining their substantial caseloads) perform primarily an error-correcting role: because they experience the general flow of appellate litigation, the principal responsibility of ensuring fidelity to existing law in judicial decision-making falls on them. In discharging this important function, the intermediate appellate courts screen out cases for the state high courts, “enabling the latter (in conjunction with their discretionary jurisdiction) to better engage in their law development role.”⁴⁶

That the flow of appeals is centered in the intermediate appellate courts also implicates a role for them which reaches beyond error-correcting and screening.

[I]t is those courts which are in a better position to determine in what areas of the law confusion is occurring and where reform or clarification is necessary. This suggests a second role for the intermediate court—to stimulate revision in the law, either by the highest court through common

Section 1983, Comity and the Federal Caseload, 1973 LAW & SEC. ORD. 557, 559. He was bluntly critical of federal judicial opinions which reflect “deep distrust of state law, state courts, state government, and state and locally elected officials.” Ruggero J. Aldisert, *Philosophy, Jurisprudence, and Jurisprudential Temperment of Federal Judges*, 20 IND. L. REV. 453, 494 (1987). Such views are not shared by some academic lawyers, whose focus on the importance and excellence of the federal judicial system comes at the expense of a more balanced view of the proper and complementary roles of federal courts and state courts. See, e.g., Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977), cited in Solimine, *supra* note 2, at 356 n.100.

42. Solimine, *supra* note 2, at 360.

43. DANIEL J. MEADOR ET AL., APPELLATE COURTS 250 (1994).

44. SUPREME COURT OF INDIANA, 1999 INDIANA JUDICIAL REPORT 26-27 (1999).

45. *Id.* at 21.

46. Solimine, *supra* note 2, at 360.

law doctrine or by the legislature through the enactment of statutes.⁴⁷

The intermediate appellate courts can accomplish this by embedding in their written opinions direct or oblique signals to the state legislature or the state's highest court that change or reform is needed. Indeed, these courts can take the impulse for reform into their own hands—less legitimately perhaps—by the process of distinguishing unwelcome precedent for the purpose of modifying or undermining established doctrine.⁴⁸

Is it legitimate, however, for a state intermediate appellate court openly to refuse to follow a state supreme court decision because it is convinced that the supreme court itself would no longer adhere to its earlier decision? Consider the view of Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit:

[J]ust as an intermediate federal appellate court may properly decline to follow a U.S. Supreme Court decision when convinced that the Court would overrule the decision if it had the opportunity to do so . . . , so many intermediate state appellate courts decline to follow earlier state supreme court decisions for the same reason—especially when almost a century has passed since the earlier decisions. And if we think the intermediate state appellate court has made a correct or even, perhaps, just a defensible prediction of what the state supreme court would do if the question were put to it, then we are bound to follow its ruling in a diversity case or any other case where the issue is one of state law⁴⁹

This seems to be a sensible portrayal of a state intermediate appellate court's legitimate function under the circumstances described.

If federal courts are permitted to look to decisions of state intermediate appellate courts in ascertaining state law, to what sources may the latter look in ascertaining federal law, assuming that the U.S. Supreme Court has not spoken directly on the issue? Presumably, they may canvas the decisions of lower federal courts for guidance. However, Professor Solimine poses a stickier question: "What if the lower federal courts and the state high court disagree on an issue of federal law?"⁵⁰ His answer:

[G]iven the truism that the Supremacy Clause binds all parts of the federal and state governments, including state IACs, it would seem to follow that an IAC could justifiably depart from a state supreme court holding if the overwhelming weight of authority (from lower federal courts, and from other states' courts) was to the contrary.⁵¹

These qualifiers load the conclusion, but it seems to me that a state

47. MEADOR ET AL., *supra* note 43, at 247.

48. *Id.* at 247-48.

49. *Indianapolis Airport Auth. v. Am. Airlines, Inc.*, 733 F.2d 1262, 1272 (7th Cir. 1984).

50. Solimine, *supra*, note 2, at 362.

51. *Id.*

intermediate appellate court should adhere to its state supreme court's interpretation of the federal law unless—to add my own qualifier—the intermediate appellate court concludes for legitimate reasons that the state's highest court would no longer follow its earlier interpretation (e.g., it bears the earmarks of a legal relic). This would be congruent with hierarchical expectations, and I think a contrary conclusion based on the Supremacy Clause begs the question. While the Supremacy Clause obligates state courts to abide by federal law, including federal law announced in orders of lower federal courts having geographical jurisdiction within the state, the authoritative expositor of federal law is the United States Supreme Court, not “overwhelming” (but non-binding) authority from “lower federal courts, and from other states’ courts.”⁵² Why then should a state intermediate appellate court reject its supreme court's considered interpretation of federal law, especially if it is true—as Professor Solimine has argued—that state courts are fully competent to decide issues of federal law, subject only to ultimate monitoring by the United States Supreme Court?

52. *Id.*

APPELLATE REFORM: THE APPELLATE PROCESS TASK FORCE MODEL

GARY E. STRANKMAN*

When California's Chief Justice Ronald M. George created the Appellate Task Force in May 1997, he charged it to

examine the constitutional requirements, statutory provisions, and rules of court governing the manner in which appellate courts perform their functions and . . . evaluate court organizational structures, work flows, and technological innovations that affect the work of the Courts of Appeal. The task force shall make recommendations to the Judicial Council for how the functions, structure, and work flow might be revised to enhance the efficiency of the appellate process. The scope of the examination should include the jurisdiction of the Courts of Appeal, mandatory and discretionary review including the use of writs in lieu of appeals for specified cases, the requirement for written opinions with reasons stated in every case, the requirements for publication of opinions, alternative types of dispositions, alternative appellate processes and different timetables for different types of appeals, use of subordinate judicial officers, and other structural changes, such as the use or elimination of divisions in the Courts of Appeal.¹

This broad charge has served to guide the deliberations of the Task Force for the past two years.

The twenty-one members of the Task Force provide varying perspectives and significant appellate experience. The nine justice members come from each of the nine sites of the court of appeal. One judge of the superior court serves. Six appellate practitioners represent the bar. They include a deputy attorney general, the director of an appellate project that represents defendants in criminal cases, and four private counsel from a variety of practice backgrounds. Two additional attorneys come from the staff of the court of appeal. One clerk administrator from the court of appeal and one deputy clerk from the supreme court also served to provide valuable information concerning the internal procedures of the appellate process. A law professor with a long-standing interest and considerable experience in appellate procedure completes the group. Supreme court Justice Marvin R. Baxter is the judicial council liaison and Professor J. Clark Kelso is the reporter. The administrative office of the courts provides staff support.

The Task Force first met on June 30, 1997.² Three subcommittees were formed: Court Operations; Ideas and Projects—Case Management; and Jurisdiction.³ For the next six months all meetings of the larger group and the

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1. Report of the Appellate Process Task Force, 2-3 (2000).

2. *Id.* at 3.

3. *Id.*

subcommittees consisted primarily of brainstorming and agenda-setting.⁴ As indicated in our reports, we considered an extensive list of issues, which included the following:

- organization of districts and divisions;
- changes in juvenile law that affect appeals;
- pro per representation;
- vexatious litigants;
- allocation of work between courts of appeal and appellate divisions of superior courts;
- allocation of work between court of appeal districts and divisions;
- differential case management;
- use of docketing statements;
- calendar preferences;
- screening for expedited appeals;
- greater use of writ review in lieu of appeal;
- greater use of “certificate of probable cause” as prerequisite to appeal;
- use of subordinate judicial officers such as commissions or referees;
- use of retired justices;
- sanctions of non-meritorious appeals;
- appellate ADR and settlement;
- excerpts of the trial record;
- electronic record preparation;
- limitations on briefs;
- *Wende* briefs;
- special appellate panels for particular subjects;
- appellate education and training programs;
- oral argument;
- tentative opinions;
- publication of opinions;
- memorandum opinions;
- stare decisis and en banc procedures; and
- internal operating procedures.⁵

All of these topics have been discussed and debated within the Task Force, though specific recommendations have not resulted for each topic.

Perhaps the most significant, yet least acknowledged, aspect of the Task Force’s work has been the sharing of the markedly differing methods of processing work. The court operations subcommittee sent a detailed questionnaire to justices, attorneys, and support personnel at each of the appellate court sites.⁶ Subcommittee members then conducted personal visits and interviews at all of the locations. This first-ever survey resulted in valuable information about the differing practices and perspectives from around the state, which enriched the deliberations, the report, and recommendations of the Task

4. *Id.*

5. *Id.* at 3-4.

6. *Id.* at 4.

Force.

Some of these differences were open and well-known, if not well-studied. For example, variations exist in how courts without divisions and divisional courts distribute the process cases. The central staff in some courts works for the court as a whole under the supervision of a principal attorney, while other courts disperse their central staff resources to the divisions or even chambers. But more subtle, and at times unrecognized, differences exist—like the manner in which writs are considered or even how individual chambers divide up the work and produce tentative opinions. The opening-up of these and many other practices, some relating only to the work of the clerical staff, will allow those practices that appear to have more merit to become better-known and more widely adopted without any proscriptive top-down disapproval of less meritorious practices and systems. The light of knowledge and logic will weaken the power of repetition exemplified by the old saw, “that is the way we have always done it.”

Thus far, the Task Force, by consensus or substantial majority vote, has made the following recommendations:⁷

- The four stand-alone divisions in Ventura County (2nd App. Dist., Div. 6), San Diego County (4th App. Dist., Div. 1), San Bernardino/Riverside County (4th App. Dist., Div. 2), and Orange County (4th App. Dist., Div. 3) should be converted into separate districts.
- Rule 6.52 of Title Six of the Rules of Court should be amended to require the Administrative Presiding Justices Advisory Committee to submit an annual report to the Chief Justice and the Supreme Court addressing the workload and backlog of each district and division, to ease analysis of equalizing caseloads under rule 20 of the rules of Court and article VI, section 6 of the state’s constitution.
- A new Rule of Court should be adopted requiring the filing of a statewide docketing statement in civil appeals that can be used, among other things, to help identify jurisdiction on appeal.
- A new Rule of Court, rule 975, should be adopted to encourage the use of memorandum opinions when an appeal or an issue within an appeal raises no substantial points of law or fact.
- A pilot project should be established in two appellate districts to explore the use of subordinate judicial officers on appeal.
- Code of Civil Procedure section 906 should be amended to provide that the following issues must be raised in a motion for new trial in order to be cognizable on appeal: juror misconduct, accident or surprise which ordinary prudence would not have prevented, newly discovered evidence which could not have been discovered with reasonable diligence and excessive or inadequate damages.

An abbreviated discussion of a few of the Task Force’s reasons for some of these recommendations follows.

In the fiscal year, 1997-1998, the ninety-three justices of the courts of appeal

7. *Id.* at 4-7.

saw 15,931 records filed.⁸ The nine sites varied between a low of 123 appeals with records filed per justice to a high of 202 per justice.⁹ This disparate workload has implications for staffing, internal procedures, and work product at each site. The local legal culture within and without each location also dramatically affects staffing differences among the districts. For example, some justices work with three or more attorneys, others with the traditional two.¹⁰ Courts also do not handle the so-called "routine disposition" cases in the same manner. Some courts utilize a central staff to process these cases, while others assign them to chambers.¹¹ It is not possible, nor even desirable, to dictate a standard methodology that each court must follow, and the practice of locally tailored responses to the work is to be encouraged. Just as no vehicle attains maximum efficiency without a gearshift, the judiciary needs to be able to adjust the way in which different cases under divergent situations are handled.

Nevertheless, the Task Force recognized that at times the nature and volume of the work might well reach proportions that stretch even the most efficient court beyond its capacity to respond in a timely fashion. This recognition underlies our recommendation for a yearly review by the administrative presiding justices to identify these situations and recommend measures to the chief justice and the supreme court for equalizing the caseload under article VI, section 6 of the constitution and rule 20 of the rules of court. This annual exercise should serve to focus attention on unnecessary delay produced by unequal distribution of work and to encourage courts to take all prudent steps to limit the necessity of statewide action.

As a further encouragement to use the judicial "gearshift," the Task Force proposed new rule 975 of the rules of court to guide and sanction the use of memorandum opinions. The rule would not mandate the use of the opinions, but would legitimate their place and provide standards and guidelines for the types of cases suitable for this treatment and the form of the opinion itself.¹² The Task Force is firmly convinced that the disciplined utilization of shortened opinions would not compromise either the reality or the perception of justice. All practitioners and justices recognize the existence of a band of cases that properly could be handled in the recommended manner.

The current recommendations should not be seen as the final product of the Task Force. Many of the topics about which no recommendations have been made continue to be studied.¹³ As Chief Justice Arthur Vanderbilt of New Jersey frequently remarked, "Judicial reform is no sport for the short-winded."¹⁴ The Task Force has discovered that for improvements to occur, they must be well planned, carefully considered and persistently urged. There are no quick fixes

8. *Id.* at 24.

9. *Id.* at 27.

10. *Id.* at 26-27.

11. *Id.* at 25-26.

12. *Id.* at 48.

13. *Id.* at 5-6.

14. 2000 FAMOUS LEGAL QUOTATIONS 496 (M. Francis McNamara ed., 1967).

or universal solutions in a state as large and diverse as California.

A graphic example of the complexity of reform centers on the move to unify the superior and municipal courts. This union had the unintended consequence of forcing a new look at the jurisdiction, processes, and practices of the existing appellate divisions of the superior court. These divisions vary from the sophisticated and well-staffed operation in Los Angeles County to the ad hoc and somewhat haphazard operations in some other areas. Procedures which make sense in large counties are of little benefit and doubtful efficacy in smaller jurisdictions. Yet issues of peer review, levels of jurisdiction, and obsolete rules remain constant. At the urging of the Task Force, Chief Justice George formed the Ad Hoc Task Force on the superior court appellate divisions to study the problem and make recommendations.¹⁵ The eight-person group includes three members of the original Task Force and is chaired by Justice William Rylaarsdam. A survey by this group of all fifty-eight counties led to the realization that this problem area is far more complex and difficult than any had imagined. Although “one size fits all” solutions are simply not workable given the population and geographic variations of the state, improvements can and should be made. This discrete example demonstrates the confounding difficulties confronting the judicial reformer.

When the initial terms of all the members expired, the members of the Task Force took individual action that demonstrates the value and importance of its work. Each individual had to choose whether to opt for an additional term of service. Every single member asked to be reappointed, including two justices who had retired. This act more than any other underscores the value that each member puts on serving in the cause of judicial reform and the demonstrable achievements that have been made by this group in that end.

While the Task Forces’ recommendations and its on-going deliberations provide a good beginning, much remains to be done. Certainly the future will bring change. For example, the old distinction between the published and non-published case is fast becoming blurred with the fruition of the digital age, and the distinction now is between citable and noncitable cases. However, it is questionable how long a useful but uncitable case known to all the parties and the court can remain impotent. The old paradigms pass and new ones appear. The role-creating behavior of Oliver Wendell Holmes working with a dipped pen at a standing desk or Learned Hand writing opinions with a fountain pen while lying on his couch once served as useful judicial images. But the need for each California appellate justice to produce eight to fifteen opinions a month has rendered this behavior as outmoded as shorthand court reporters. The struggle to envision methods that pour the old wine of fairness and justice into the new bottles of volume and efficiency will not be without contests of perceptions, imagination, prescriptions, and will. No individual, nor any committee can claim

15. Report of the Appellate Process Task Force, *supra* note 1, at 5.

omniscience; only the desire to express clearly honest belief. The Task Force trusts that its recommendations fulfill that need.

The Task Force continues to study a variety of other subjects connected with the appellate process and is considering further recommendations.¹⁶

16. Copies of the Task Force's latest report may be obtained from the Judicial Council of California, 455 Golden Gate Avenue, San Francisco, California, 94102.

THE SPECIAL PROFESSIONAL CHALLENGES OF APPELLATE JUDGING

RANDALL T. SHEPARD*

Toward the end of the Twentieth Century, the American public developed a fascination with trial court proceedings. Courtroom dramas and comedies—from *L.A. Law* through more recent series such as *The Practice*, *Law and Order*, *Judging Amy*, and *Ally McBeal*, to name only a few—became entertainment staples. Cameras in real courtrooms and pseudo-courtrooms (as in the many spin-offs of Judge Wapner’s so-called *People’s Court*) have made us a nation of armchair litigators.¹

Appellate court decision-making occupies the public stage in a different way. Until recently, only a relatively small number of highly publicized appellate opinions received public attention. On a national scale, case names such as *Brown v. Board of Education*,² *Miranda*,³ and *Roe v. Wade*⁴ have become part of our cultural vocabulary. The names of landmark state cases are less well-known; nonetheless, citizens are accustomed to a steady stream of news about significant appellate court decisions on hot topics such as police roadblocks⁵ and the authority of high school student athletic associations.⁶

Until recently, appellate courts necessarily operated mostly in the shadows, with their opinions sometimes widely reported but their inner workings shielded from scrutiny. The year 2000 changed that in dramatic ways, as I explain in Section I below. Public interest in appellate court dynamics has now heightened to the point that two television networks have developed series “that promise a peek behind the [U.S. Supreme Court’s] heavy red curtains and into the lives of the nine justices and their staffs.”⁷

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1. See Mike Farrell, *There’s Disorder in the Court—and Television Stands Accused*, L.A. TIMES, May 31, 2000, at B9 (editorial by television actor and member of the California Commission on Judicial Performance, criticizing shows like *Judge Judy* for giving the public a negative and misleading impression of the judiciary).

2. 347 U.S. 483 (1954).

3. *Miranda v. Arizona*, 384 U.S. 436 (1966).

4. 410 U.S. 113 (1973).

5. See, e.g., *State v. Gerschoffer*, 738 N.E.2d 713 (Ind. Ct. App. 2000), *transfer granted, opinion vacated by* 753 N.E.2d 6 (Ind. 2001).

6. See, e.g., *Ind. High Sch. Athletic Ass’n v. Martin*, 741 N.E.2d 757 (Ind. Ct. App. 2000), *transfer granted, opinion vacated by* 753 N.E.2d 18 (Ind. 2001); *Ind. High Sch. Athletic Ass’n v. Carlberg*, 694 N.E.2d 222 (Ind. 1997).

7. *Nets Making Shows About High Court*, *Indiatimes Legal News* (Apr. 12, 2001), <http://www.indiatimes.com/120401ap/12ente9.htm>. One series features Sally Field “as a left-leaning justice”; the other, James Garner “as an aging lion of a chief justice.” *Id.* The producer of one series discussed his plans with Chief Justice Rehnquist, who expressed “very direct” opposition. *Id.* (quoting Rob Scheidlinger, producer of ABC’s *The Court*).

This increased interest in appellate court workings, both real and fictional, has made it more important than ever that actual appellate judges strive to maintain a very high level of ethical behavior. This article begins by reviewing some events during the year 2000 that placed appellate judges in the limelight. I then explore several special ethical challenges which appellate judges face and suggest standards that we should observe.

I. LAST YEAR'S HEADLINERS

The first appellate court drama to attract national attention in the year 2000 was the impeachment of Chief Justice David Brock of the New Hampshire Supreme Court.⁸ Chief Justice Brock endured an eight-month ordeal that culminated in a three-week trial in the state senate.⁹ Though the senate acquitted Brock, the court sustained a terrible battering, prolonged by debate over who should pay the two million dollars in legal costs.¹⁰

Later in the year, two dramatic election contests drew the media's attention to the extremely difficult role of elected judges. In Ohio, the business community made a major effort to replace state supreme court Justice Alice Robie Resnick in a struggle the *Columbus Dispatch* called "the dirtiest judicial race in Ohio history."¹¹ During the same election cycle, plaintiffs' lawyers in Michigan launched an expensive campaign to oust three members of that state's supreme court.¹² That campaign turned especially ugly after the chair of the Michigan Democratic Party attacked one of the incumbents, implying that he was a traitor to his race.¹³ Both of these efforts failed.

The Florida election crisis brought further uninvited attention to both the appellate product and the process behind it. When Election Day 2000 arrived, one might safely have wagered that most Floridians could not name even one of their state supreme court justices. By late fall, a new wave of court-watchers could not only name names, but also could debate the conventional wisdom

8. See John DiStaso, *Brock Impeached; Chief Justice Faces Historic Senate Trial*, UNION LEADER (Manchester, N.H.), July 13, 2000, at A1.

9. See Shirley Elder, *No Longer Business as Usual as Brock Returns to Courthouse*, BOSTON GLOBE, Oct. 15, 2000 (New Hampshire Wkly.), at 1.

10. See Lois R. Shea, *Three Justices Sue N.H. for Legal Fees*, BOSTON GLOBE, Mar. 14, 2001, at A1.

11. Joe Hallett, *Officials Ponder a Vaccine for Vicious Judicial Campaigns*, COLUMBUS DISPATCH, Jan. 31, 2001, at 2B.

12. See Amy Lane, *Battle Supreme Brews for Top Court in State; Big Money Will Fuel Struggle for Parties' Nominations*, CRAIN'S DETROIT BUS., Apr. 3, 2000, at 1.

13. See Charlie Cain, *High Court Race Will Be Nasty, Pricey; Interest Groups Pump Millions Into Races for Three Seats on State Supreme Court*, DETROIT NEWS, June 23, 2000, at 1 (reporting that Democratic Party activists circulated fliers at an NAACP fund-raiser that stated that Robert Young, Jr., the only African-American justice, was a "staunch believer" that *Brown v. Board of Education* was wrongly decided).

regarding the philosophical bent of each member of that court.¹⁴

Our federal cousins shared in the uninvited attention. As the Bush versus Gore election controversy unfolded, the U.S. Supreme Court felt the heat of intense and unwelcome scrutiny from court head-counters and handicappers.¹⁵

When the dust finally began to settle on *Bush v. Gore*,¹⁶ still another federal appellate court occupied the front pages. While still presiding over the Microsoft antitrust case, District Judge Thomas Penfield Jackson gave media interviews in which he compared Bill Gates to Napoleon and other company executives to drug gangs.¹⁷ Judge Jackson also accused the D.C. Court of Appeals of “making up [ninety] percent of the facts on their own” in an earlier Microsoft ruling, and described the circuit judges as “supercilious” and lacking in trial experience.¹⁸ On appeal, the D.C. Circuit became the top story of the day when it held unanimously that Judge Jackson committed “deliberate, repeated, egregious and flagrant” ethical violations that created an appearance of judicial bias and necessitated Jackson’s removal from the case on remand.¹⁹

14. See Joan Biskupic & Martin Kasindorf, *Deadline Looks Doubtful as Legal Knot Tightens; Courts Schedule Hearings for Friday on Fla. Vote Disputes*, USA TODAY, Nov. 16, 2000, at 3A (profiling Florida’s Supreme Court justices); *NBC Nightly News* (NBC television broadcast, Nov. 20, 2000) (discussing “Who are these men and women who have such a pivotal role in history?”).

15. See *Bush v. Gore*, 531 U.S. 98 (2000). The Court notes that

[n]one are more conscious of the vital limits on judicial authority than are the Members of this Court, and none stand more in admiration of the Constitution’s design to leave the selection of the President to the people, through their legislatures, and to the political sphere. When contending parties invoke the process of the courts, however, it becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront.

Id. at 111; see also Joan Biskupic, *Election Still Splits Court: Friction Over Justices’ Ruling on Ballot Count in Florida Continues to Cause Hard Feelings, Draw Angry Letters, Even Spark Talk of at Least One Imminent Retirement at High Court*, USA TODAY, Jan. 22, 2001, at 1A (describing the U.S. Supreme Court justices as “uncomfortable with their role in such a high-stakes political contest”).

16. See 531 U.S. at 98; *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000); *Gore v. Harris*, 772 So. 2d 1243 (Fla. 2000); *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1220 (Fla. 2000).

17. See *Excerpts From Second Day of Arguments in Appeal of the Antitrust Case*, N.Y. TIMES, Feb. 28, 2001, at C6; *Judge’s Comments May Affect Appeal of Microsoft Decision*, CHARLESTON GAZETTE, Feb. 26, 2001, at P3D [hereinafter *Judge’s Comments*]; Stephen Labaton, *Judges Voice Doubt on Order Last Year to Split Microsoft*, N.Y. TIMES, Feb. 28, 2001, at A1.

18. James V. Grimaldi, *Microsoft Judge Lashes Out; Jackson Says Panel That Will Hear Appeal “Made Up” Facts*, WASH. POST, Jan. 9, 2001, at E11 (also quoting Judge Jackson as accusing the Court of Appeals of “‘embellish[ing]’ the law with ‘superficial scholarship’”); *Judge’s Comments*, *supra* note 17.

19. Stephen Labaton, *Appeals Court Voids Order for Breaking Up Microsoft but Finds It Abused Power*, N.Y. TIMES, June 29, 2001, at A1; John Schwartz, *A Judge Overturned by an Appearance of Bias*, N.Y. TIMES, June 29, 2001, at C1.

II. WHY OUR CODES OF CONDUCT ARE NOT ENOUGH

When we appellate judges find ourselves thrust into the spotlight in this manner, our first reaction is to look to the codes of conduct designed to give us guidance on ethical issues.²⁰ The problem is that none of the canons in the Model Code of Judicial Conduct speaks specifically to appellate judges. Caveats against financial conflicts²¹ and ex parte communications²² certainly help all judges stay on the straight and narrow, but they do not address some of the unique challenges that appellate judges confront.

Appellate courts routinely deal with broad issues and set precedents that significantly affect many lives. The high stakes in these cases inevitably create heightened ethical responsibility. Many observers question whether we are living up to that responsibility.²³

In 1998, Paul Carrington of the Duke University School of Law said, "Among our political institutions, none are more troubled than many of our highest state courts."²⁴ The public record suggests some foundation for this assertion. During the year 2000, justices from no fewer than five state high courts faced various accusations of ethical misconduct,²⁵ and at least three state

20. See, e.g., IND. CODE OF JUDICIAL CONDUCT (2000).

21. See IND. CODE OF JUDICIAL CONDUCT Canon 4(D) (2000).

22. See IND. CODE OF JUDICIAL CONDUCT Canon 3(B)(8) (2000).

23. See, e.g., Fred Bayles, *N.H.'s High Court Teeters on Edge of a Great Fall*, USA TODAY, Apr. 7, 2000, at 4A (reporting that one of New Hampshire's five justices had resigned and that the state legislature had taken steps toward impeachment of one or more of the remaining justices, and describing the state of affairs as "a constitutional crisis . . . [that] could affect state courts around the country"); *Corrupting Influences Grow in Contests for Judgeships*, USA TODAY, Nov. 2, 2000, at 16A (noting that high-stakes judicial elections are "spawning questionable tactics"); Bill Hume, *Political Influence on the Law Lies in the Eye of Beholder*, ALBUQUERQUE JOURNAL, Aug. 13, 2000, at B2 (describing controversial New Mexico Supreme Court decisions in 1995 and 1999 and noting, under the heading "Politics or the Law?", that all the justices who decided those cases were Democrats); Joe Stephens, *Judges Ruled on Firms in Their Portfolios; Appeals Jurists Attribute Participation to Innocent Mistakes*, WASH. POST, Sept. 13, 1999, at A1 (citing eighteen 1997 cases in which federal appeals court judges ruled in matters involving companies in which either the judges or their family members had equity interests).

24. Paul D. Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, 61 LAW & CONTEMP. PROBS. 79, 79 (1998).

25. See Jo Becker, *Lawyers Demand Justices' Recusal*, ST. PETERSBURG TIMES, Mar. 25, 2000, at 1A ("Conversations with lawmakers should disqualify [two Florida Supreme Court justices] from ruling on the death row appeals law, the attorneys argue."); James Bradshaw, *Complaint Alleges Ohio Chief Justice Violated Canons*, COLUMBUS DISPATCH, Apr. 25, 2000, at 4D (reporting chief justice of Ohio Supreme Court charged with making impermissible public endorsement of candidate opposing another incumbent justice); John DiStaso, *Judges Tried to Influence, Horton Says*, UNION LEADER (Manchester, N.H.), Apr. 6, 2000, at A1 (reporting statement by state supreme court justice that high court judges who were disqualified from cases

appellate court judges were publicly censured or reprimanded by their state supreme courts.²⁶ Some of these judges were ultimately exonerated,²⁷ but often the public remembers only the scandal.

Just as people who do no wrong may be sued, of course, judges who do no wrong may be accused. Still, as professionals, we must promote judicial integrity out of respect for the institutions we inhabit, even when our written codes of conduct do not speak directly to all of the situations we encounter. The recent sagas in New Hampshire, Ohio, Michigan, Florida and Washington, D.C.²⁸ have made that duty more important—and more challenging—than ever.

In the following Sections, I offer thoughts on ethical concerns that are unique, or at least particularly important, to appellate judges. These are panel decision-making, published written opinions, oral arguments, recusal, communications with legislators, and the use of judicial clerks.

due to conflicts of interest sometimes offered input to other justices on those cases); William Glaberson, *States Rein in Truth-Bending in Court Races*, N.Y. TIMES, Aug. 23, 2000, at A1 (“For the first time in its history, Alabama’s judicial discipline panel has filed charges against an incumbent justice of the State Supreme Court[]” for allegedly making false campaign statements); Maurice Possley & Matt O’Connor, *Three Justices Questioned on Judicial Vacancies; Appointment Process Probed by U.S. Agents*, CHI. TRIB., Apr. 27, 2000, at N1 (“Federal agents have interviewed three Illinois Supreme Court justices in Cook County as part of a grand jury investigation of appointments to fill judicial vacancies . . .”).

26. See James Bradshaw, *Female Chief Justice a First for Court*, COLUMBUS DISPATCH, Aug. 31, 2000, at 4C (reporting that Ohio appeals court judge was sanctioned for using free labor from jail inmates and welfare recipients to construct campaign signs); *In re Schwartz*, 755 So. 2d 110 (Fla. 2000), *infra* note 49; *In re Frank*, 753 So. 2d 1228 (Fla. 2000) (reprimanding former appellate judge for making false or misleading statements during attorney discipline proceeding and for failing to disclose that an attorney appearing before him was representing a member of his immediate family in highly contentious domestic litigation).

27. See, e.g., William Glaberson, *Court Rulings Curb Efforts to Rein in Judicial Races*, N.Y. TIMES, Oct. 7, 2000, at A9 (reporting that Alabama Justice Harold F. See, Jr., won a temporary injunction barring his removal from office by disciplinary officials, on the basis that his argument that the Alabama ethics rule was too broad was likely to prevail at trial); *Injudicious: Some High Court Rivals Stray Out of Bounds*, COLUMBUS DISPATCH, Sept. 26, 2000, at 8A (reporting that the complaint against Ohio’s Chief Justice Moyer was dismissed by a three-judge disciplinary panel); Ralph Ranalli, *N.H. Senate Acquits State’s Chief Justice*, BOSTON GLOBE, Oct. 11, 2000, at A1.

28. Similar judicial problems have occurred in Idaho and Alabama. See William Glaberson, *Fierce Campaigns Signal a New Era for State Courts*, N.Y. TIMES, June 5, 2000, at A1 (reporting that Idaho judge Daniel Eismann defeated an incumbent Supreme Court justice for the first time since 1944 after a ferocious campaign in which he was unusually open in expressing views such as his belief that the theory of evolution cannot be true); Glaberson, *supra* note 25 (reporting that Alabama’s judicial panel charged that an incumbent state supreme court justice “falsely said in television advertisements during [a] campaign . . . that his opponent ‘let convicted drug dealers off’ at least 40 times”).

III. THE PERILS OF DECISION-MAKING BY COMMITTEE

A. Panel Opinions: Good News, Bad News

As a former trial judge, I can say that the best and worst thing about the trial bench is the fact that you fly solo. The freedom of not having to confer with anyone else carries with it the isolation that flows from always acting alone.

Though each appellate judge must decide individually whether to concur or dissent in a given case, appellate panels function as a group. We have an opportunity that trial judges do not enjoy: to debate the issues among ourselves and to draw from our colleagues' wisdom as we arrive at our own conclusions.

I firmly believe that this process of give-and-take has great value, although I admit that it does not always feel like a blessing on days when a case conference goes into the judicial equivalent of triple overtime. My colleague Justice Brent Dickson sometimes tells his staff as he walks out the door, "I'm off to wage conference." Anyone who has served on a committee would surely agree that group decision-making can be an intensely frustrating process.

B. The Proper Judicial Temperament

Maintaining civility in times of conflict may require judicial restraint in the purest sense of the phrase, but it is absolutely imperative if we are to maintain public respect for the judiciary. In 1996, Justice Anthony M. Kennedy said: "The collegiality of the judiciary can be destroyed if we adopt the habits and mannerisms of modern, fractious discourse. Neither in public nor in private must we show disrespect for our fellow judges."²⁹ Justice Kennedy's colleagues appear to share these sentiments. In the aftermath of the election controversy, the United States Supreme Court has gone public in an unprecedented effort to counter rumors of personal animosity among the justices.³⁰

Still, tensions occasionally flare into public view. In 1991, Ohio Justices Craig Wright and Andrew Douglas actually came to fisticuffs in court offices.³¹ Elections can create especially hard feelings, as when four members of the Wisconsin Supreme Court joined the effort to replace Chief Justice Shirley Abrahamson,³² or when Chief Justice Moyer and Justice Resnick ended up on

29. Anthony M. Kennedy, *Judicial Ethics and the Rule of Law*, 40 ST. LOUIS U. L.J. 1067, 1072 (1996).

30. See Linda Greenhouse, *Election Case a Test and a Trauma for Justices*, N.Y. TIMES, Feb. 20, 2001, at A1; see also Helen Thomas, *Justices Engage in Spin*, SEATTLE POST-INTELLIGENCER, Mar. 2, 2001, at C5 (reporting that the Supreme Court has "launched a public relations campaign by fanning out to college campuses and law schools and other forums to put the best spin on [*Bush v. Gore*]").

31. See Catherine Candisky, *Court Hearing for Lawyer Sparks Old Feud Between Justices*, COLUMBUS DISPATCH, Nov. 29, 2000, at 6B.

32. See David Callender, *Court's Path Unlikely to Change; Sykes Wins by Landslide Over Butler*, CAPITAL TIMES (Madison, Wis.), Apr. 5, 2000, at 3A.

opposite sides of Ohio's 2000 election.³³ The federal judiciary also has experienced some particularly harsh examples, such as Judge A. Leon Higginbotham, Jr.'s extended public campaign against Justice Clarence Thomas.³⁴

C. Civility Is a One-to-One Effort

Personal challenges demand personal solutions.³⁵ My former colleague, Justice Roger DeBruler, habitually used our official titles when addressing other members of the court, even in the most casual situations. He might say, "Justice Dickson, can you go to lunch today?" or, "Justice Selby, I failed to record your vote in this case; what was it?"

For a long time I believed that Justice DeBruler spoke so formally as a way of maintaining his distance. Eventually, I came to understand that he was not being aloof, but instead was subtly reaffirming, on a day-to-day basis, his respect for the office and for each officeholder.

Other courts have turned to more overt methods of building personal ties. In the aftermath of the Wisconsin election, for example, that state's supreme court scheduled a joint seminar with court of appeals judges designed, as one newspaper reported, "to help them learn to get along with each other."³⁶

The Indiana Court of Appeals has gone a step further by institutionalizing the practice of a regular court retreat. There is nothing magic about their formula: they find a congenial setting away from telephone and e-mail interruptions, devise an agenda that covers major problem areas, and hire a capable facilitator. The participants reported so enthusiastically on the effectiveness of these retreats that they convinced our court to adopt the same practice.

D. Confidentiality Within the Court

One final risk that is unique to decision-making by committee deserves mention. Appellate courts face unique issues when it comes to confidentiality among the judges. The zone of confidentiality shielding a court's pre-decision adjudicative activities from the outside world is a familiar part of the landscape

33. In April 2000, the *Columbus Dispatch* reported allegations that Ohio's Chief Justice had violated the prohibition against speeches or public endorsement for political candidates by judges. Chief Justice Moyer reportedly told state Republican Party officials that they could "restore balance" to a court that had overturned certain legislation four-to-three by supporting incumbent justice Alice Robie Resnick's opponent. Bradshaw, *supra* note 25.

34. See, e.g., A. Leon Higginbotham, Jr., *Disinvitation: Talking Back to Thomas*, NAT'L L.J., Aug. 3, 1998, at A23.

35. Justices Antonin Scalia and Ruth Bader Ginsburg, who frequently find themselves on opposite sides of issues, have for years enjoyed New Year's Eve dinner together, along with their spouses. They continued their tradition this year, less than three weeks after the curtain fell on *Bush v. Gore*. See Greenhouse, *supra* note 30, at A18.

36. Cary Segall, *Justices to Have Seminar on Getting Along*, WIS. ST. J., June 9, 1999, at 5C.

with accepted boundaries. Last year's impeachment of New Hampshire Chief Justice David Brock and two of his fellow justices raised a different question: that of internal confidentiality.³⁷ The instrument of impeachment charged, among other things, that Chief Justice Brock routinely "allowed" his fellow justices to comment on cases from which they had been disqualified.³⁸ The state senate exonerated all three justices on all charges, but the closest vote occurred on this allegation.³⁹

One can easily imagine how this practice came into being. Sometimes judges do not make recusal decisions until late in a case, especially in cases without oral argument, and it would be considered rather ordinary to circulate drafts of everything to every judge. Then, some non-participating judge sends a note about a factual error, and so on.

A free flow of information within the court is invaluable, because it helps maintain a collegial atmosphere conducive to frank discussion and compromise. Still, appellate judges must defend the credibility of their promise of confidentiality, and sharing information with those not participating may cause litigants to lose confidence in the integrity of the process.

IV. THE LURE OF THE POISON PEN

I next turn to the channel of communication that is the hallmark of appellate courts: the published opinion. Opinion authorship is both exhilarating and risky. New appellate judges experience great excitement at seeing their words in print—permanent print, advance sheet print, hardbound print, electronic print, and disk print. We dream that generations to follow will read our wisdom.⁴⁰

37. See Elder, *supra* note 9.

38. *Id.* Most appellate judges view the responsibility for such practices as falling on the court as a whole, not solely on the chief judge.

39. *Id.*

40. As Justice Oliver Wendell Holmes told a group of Harvard undergraduates in 1886:

No man has earned the right to intellectual ambition until he has learned to lay his course by a star which he has never seen—to dig by the divining rod for springs which he may never reach. In saying this, I point to that which will make your study heroic. For I say to you in all sadness of conviction, that to think great thoughts you must be heroes as well as idealists. Only when you have worked alone—when you have felt around you a black gulf of solitude more isolating than that which surrounds the dying man, and in hope and in despair have trusted to your own unshaken will—then only will you have achieved. Thus only can you gain the secret isolated joy of the thinker, who knows that, a hundred years after he is dead and forgotten, men who never heard of him will be moving to the measure of his thought—the subtile rapture of a postponed power, which the world knows not because it has no external trappings, but which to his prophetic vision is more real than that which commands an army. And if this joy should not be yours, still it is only thus that you can know that you have done what it lay in you to do—can say that you have lived, and be ready for the end.

G. Edward White, *Holmes's "Life Plan": Confronting Ambition, Passion, and Powerlessness*, 65

Alas, it is not usually so.⁴¹

On the other hand, there is tangible risk that the words will come back to haunt authors. When a trial judge rules a given way on Monday, then has a change of heart and rules differently on Wednesday, with a little luck, no one notices. When a written appellate opinion is permanently archived, it is much more likely that someone eventually will notice either the inconsistencies or other problems.

My focus here, however, is on a different risk: the temptation of intemperate words. In writing about the professionalism of judges, I once laid out the problem as directly as possible: "Explication of the law, even when in dissent, cannot be personal, political, or preferential, lest the rule of law be undermined."⁴²

Venomous language obscures the law and erodes civility in our profession. It is a problem that affects even the United States Supreme Court. An electronic search of the last dozen years reveals that at least five different Supreme Court Justices have characterized a colleague's opinion as either "foolish"⁴³ or "absurd"⁴⁴ at one time or another. If the judiciary is to act as one of society's

N.Y.U. L. REV. 1409, 1430-31 (1990) (quoting THE OCCASIONAL SPEECHES OF JUSTICE HOLMES 28-31 (M. Howe ed. 1962)).

41. When Judge Sol Wachtler was sworn in as Chief Judge of the New York Court of Appeals, he and his family and friends went up to the office of that court's most famous member. Wachtler observed to his wife that it was amazing to consider that he would be working at the desk of Benjamin Cardozo. She replied, "Yes, and 50 years from now it will still be known as Cardozo's desk." See David Margolick, *For Those Who Knew Him, a Different Wachtler Legacy for New York's Top Court*, N.Y. TIMES, Nov. 13, 1992, at B16.

42. Randall T. Shepard, *What Judges Can Do About Legal Professionalism*, 32 WAKE FOREST L. REV. 621, 624 (1997). I have not been alone in expressing concern about the language of written opinions. Chief Judge Judith Kaye of the New York Court of Appeals urges judges to speak through their rulings in comprehensible and accessible language. See Judith S. Kaye, *Safeguarding a Crown Jewel: Judicial Independence and Lawyer Criticism of Courts*, 25 HOFSTRA L. REV. 703, 723 (1997). Lawyers then have a corresponding duty, she asserts, to study decisions carefully before criticizing them. *Id.* at 724. One commentator said it this way: "The most dangerous aspect of the apparent growth of sarcastic majority opinions, peevish concurrences, and stinging dissents is not so much that they erode the legitimacy of appellate courts, as that they confuse the law by interjecting a high level of contentiousness and verbosity into judicial opinions" William G. Ross, *Civility Among Judges: Charting the Bounds of Proper Criticism By Judges of Other Judges*, 51 FLA. L. REV. 957, 961 (1999).

Carefully crafted decisions are absolutely essential to avoiding allegations of political decision-making or abuse of power. The restraint inherent in careful writing carries double benefits: it both promotes the orderly advancement of the law and puts a damper on extraneous, emotional language.

43. See *Sec'y of State v. Joseph H. Munson Co.*, 467 U.S. 947, 984 (1984) (Rehnquist, J., dissenting).

44. See *Hill v. Colorado*, 530 U.S. 703, 756 (2000) (Scalia, J., dissenting); *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 614 (1997) (Thomas, J., dissenting); *Nordlinger v. Hahn*, 505 U.S. 1, 36 (1992) (Stevens, J., dissenting); *Michael H. v. Gerald D.*, 491

stabilizing forces, we must use the delete button on such verbal sniping.

Most appellate judges I have known care very deeply about doing justice, but passionate commitment to justice cannot manifest itself in toxic opinion language. Words that belittle or impugn the integrity of other judges serve no purpose, and they undermine respect for all courts.

V. POSTURING AT ORAL ARGUMENT

Some of these same concerns apply to another forum with special meaning for the appellate judge: the oral argument. Vigorous exchange in open court is part of America's common law heritage; the tradition of Anglo-American courts has always been intensely verbal. Dynamic interchange is always appropriate and frequently necessary to develop issues and help the court reach a sound decision. Even when the verbal fur is flying, however, appellate judges must maintain and enforce civility toward litigants and toward their colleagues on the bench.

Oral arguments can easily exceed the boundaries of civility. We should not tolerate such excesses. In a recent Massachusetts incident, an employee sought to overturn a labor relations commission's conclusion that his union had fulfilled its duty of fair representation.⁴⁵ During oral argument on appeal, one judge declared that the union, which was not a party in the action, had "gone amok."⁴⁶ He also accused the union president and his family of squandering member dues.⁴⁷

The Massachusetts Supreme Judicial Court publicly reprimanded the judge, saying,

[a]n impartial manner, courtesy, and dignity are the outward signs of that fairness and impartiality we ask our fellow citizens, often in the most trying of circumstances, to believe we in fact possess. . . . When a judge berates or acts discourteously to those before him—even if he cannot affect their interests as litigants—he abuses his power and humiliates those who are forbidden to speak back.⁴⁸

In a second example, a Florida appellate judge verbally abused law student interns during the presentation of arguments that he considered frivolous.⁴⁹ He cut one student's presentation short by walking off the bench before the argument had concluded.⁵⁰ He interrupted another student, telling her to save her remaining time for rebuttal, "if there is rebuttal."⁵¹ He also made gratuitous,

U.S. 110, 141 (1989) (Brennan, J., dissenting).

45. See *In re Brown*, 691 N.E.2d 573 (Mass. 1998).

46. *Id.* at 574.

47. *Id.* at 574-75.

48. *Id.* at 576.

49. *In re Schwartz*, 755 So. 2d 110, 111-12 (Fla. 2000).

50. *Id.* at 111.

51. *Id.* at 112.

discourteous remarks to a professor who was in the courtroom supervising the interns.⁵² It is hard to imagine what lessons the judge was trying to impart.

Florida's Supreme Court took disciplinary action, asserting that the position of appellate judge

demands the very highest in trust and confidence from the people who are served by our court system. Nothing less than the rule of law is jeopardized when a person in such a high position breaches that trust and reduces the people's confidence that justice will be fairly administered in an impartial manner.⁵³

One subspecies of oral argument—the law school moot court—can be more difficult than we usually give it credit for. The impulse toward toughness is difficult to resist. A judge may say to himself or herself: “So these are the best; let's see how good they are,” “It's only fair that I engage all four of them,” or “Am I putting on a good enough show to attract good clerk applicants out of the audience?” Such thoughts frequently lead to a higher level of aggression in moots than most judges typically display during actual oral arguments. I sometimes wonder whether we impart the right values on these occasions.

The practice of choosing hot legal topics for moot court arguments can also pose special problems. Moot courts, of course, are purely hypothetical. Occasionally, however, a topic comes too close for comfort, especially with more people than ever reading judicial tea leaves. Two friends on the bench recently declined moot court invitations because the topic was the Fourth Amendment and police roadblocks. The issues were pending in their courts, and they rightly worried about appearing to prejudge.

VI. TO RECUSE, OR NOT TO RECUSE

The breadth of issues facing both state and federal appellate courts increases the likelihood that any given decision will affect the appellate judge or someone close to the judge. We are accustomed to situations involving financial interests, but many cases are more complicated.

To take the recent example of the Bush versus Gore election, a good many people no doubt believed that any judge who had voted for either Bush or Gore could no longer make an impartial decision.⁵⁴ Analysts amplified these concerns

52. *Id.* at 111-12.

53. *Id.* at 115. The decision to pursue this as a disciplinary matter was completely correct. It is a good deal more difficult to know what to do if such misconduct occurs and you are sitting as a member of the panel. I once had this experience and elected to follow up the other judge's tirade by offering the student a compliment.

54. See Warren Richey, *Fairly or Not, Court Takes on Political Hue*, CHRISTIAN SCI. MONITOR, Dec. 14, 2000, at 1. Richey quotes Michael Dorf, a Columbia University law professor and former law clerk for Justice Kennedy, as saying:

I would hope that none of the justices consciously thought, “What can I do to benefit the candidate I voted for?” I don't think that actually occurred, but I do think that

by breaking down each ruling in terms of which way Democrat and Republican appointees voted.⁵⁵

The problem, of course, is that recusal was not a viable option at either the state or federal level, because it would have left no one to make these urgent decisions. Still, the public perception lingers that the various state and federal rulings were politically motivated.

What, then, is an appellate judge to do? The Indiana Court of Appeals found a sensible solution when called upon to decide whether Indiana University Foundation's records were open to inspection under Indiana's Public Records Act.⁵⁶ All three assigned panel members had one or more degrees from Indiana University and/or other relationships with the University and the Foundation, and considered recusal.⁵⁷ Recusal would not have solved the problem, however, as a quick survey revealed that each of the court's other judges had some link to the either University or the Foundation, such as an Indiana University degree, a relative employed by or attending I.U., or past financial contributions to the Foundation.

The panel sought to resolve this dilemma by issuing an order disclosing its own connections and offering to appoint another panel to decide the case if either party filed a motion to disqualify. Neither party moved for disqualification, and the original panel served ably and without any controversies except those related to the merits of the case.

This solution is not a panacea for every impartiality puzzle, but it is worth considering in future cases. Recusal is a recurring theme in the life of an appellate judge, and it sometimes requires creative solutions.

VII. JUDGES AND LEGISLATION

I move now to some of the ethical issues that arise from the policy role of appellate courts. Hornbook law says that senators and representatives write statutes, but judges do not. In the real world, however, there are certainly instances in which judicial input could help avoid unintended consequences, or

political considerations in a narrow sense must have played at least some subconscious role, given what, in my view, is an inconsistency between the Rehnquist Court's general solicitousness for states and the outcome in this case.

Id. (quoting Michael Dorf).

55. *See id.* Richey also posits that

[m]any Bush supporters question whether Florida's seven Supreme Court justices, all appointed by Democratic governors, were acting more as political operatives than neutral jurists. . . . The high court, with seven justices appointed by Republican presidents and with a five-justice conservative majority, became a target of criticism from Gore supporters, who accused the justices of acting out of political self-interest rather than judicial necessity.

Id.

56. *See State Bd. of Accounts v. Ind. Univ. Found.*, 647 N.E.2d 342 (Ind. Ct. App. 1995).

57. *Id.* at 345 n.1.

at least bring them to light before the legislature casts its votes.

To cite a case in point, the 1995 meeting of Indiana's legislature increased the presumptive sentence for murder to fifty-five years.⁵⁸ Neither the legislature nor our court anticipated one consequence of this revision. At the time, a provision in the Indiana Constitution granted a right of direct appeal to the Indiana Supreme Court to those sentenced to more than fifty years in prison.⁵⁹ The legislature's decision to increase the standard sentence for murder suddenly permitted most murderers to bypass our court of appeals and take a spot on the supreme court docket.

These cases quickly dominated our caseload, to the disadvantage of other parties seeking to be heard.⁶⁰ This predicament was ultimately resolved in November 2000, when Indiana's voters amended the constitution to limit the direct appeal right to those sentenced to death.⁶¹

I cannot say that legislators would or should have made a different policy choice had they considered the direct appeal implications of the sentencing change. I do suggest, however, that this was a situation in which both our court and the General Assembly would have been more fully informed had we communicated beforehand.

To be sure, such consultation can create role conflict. Florida Supreme Court Chief Justice Major Harding and Justice Charles Wells experienced this potential recently, when two inmates challenged a new death penalty law designed to limit appeals and speed up executions.⁶² The inmates demanded disqualification of the two justices, claiming that conversations with legislators who drafted the law created a "cloud of impropriety."⁶³ The inmates cited scheduled meetings between the justices and the Speaker of the Florida House of Representatives. They also cited a letter from the Speaker thanking Chief Justice Harding for his "suggestions and input into our deliberations" and outlining the legislature's position on the proposed law.⁶⁴

Both Harding and Wells denied providing any substantive input into the

58. 1995 Ind. Acts 148, § 4 (codified at IND. CODE § 35-50-2-3 (2000)).

59. IND. CONST. art. VII § 4.

60. See Kevin Corcoran, *Measure Could Ease Court Docket: Indiana Justices Urge Voters to Have Criminals' Bench-Clogging Appeals Start at Appellate Level*, INDIANAPOLIS STAR, Nov. 2, 2000, at B3 (reporting that a proposed amendment limiting direct appeals to death penalty cases "could divert about 110 cases a year from the Supreme Court's docket, making room for lawsuits that raise significant legal questions").

61. See David Rohn, *Voters Back Rerouting of Criminals' Appeals*, INDIANAPOLIS STAR, Nov. 8, 2000, at A13 ("Voters lopped off nearly two-thirds of the Indiana Supreme Court's caseload Tuesday.").

62. Jo Becker, *Lawyers Demand Justices' Recusal*, ST. PETERSBURG TIMES, Mar. 25, 2000, at 1A.

63. *Id.*

64. *Id.*

legislation,⁶⁵ and declined to recuse.⁶⁶ Soon thereafter the court struck down key portions of the law as unconstitutional.⁶⁷ The allegations of bias proved unfounded, inasmuch as Chief Justice Harding wrote the opinion for a unanimous court.⁶⁸

Many judges would take a relatively pure position on legislative consultations, saying, in effect, "They don't write opinions and I don't write laws." I argue that neither history nor current law requires such purity and that such isolationism is not always prudent.

First, even in the history of the federal system, it is apparent that judges and legislators occasionally interacted with one another on pending business. An early example centered on one of the most famous enactments of all time, the Judiciary Act of 1801,⁶⁹ which set in motion the events leading to *Marbury v. Madison*.⁷⁰ Newspapers of the day reported that, as Congress was meeting in Philadelphia to consider the measure, "the federal judges being now in town, they of course are consulted."⁷¹

65. *Id.*

66. Jo Becker, *Justices Refuse to Step Down From Death Law Review*, ST. PETERSBURG TIMES, Mar. 31, 2000, at 1B.

67. Jo Becker, *Limits to Death Row Appeals Rejected*, ST. PETERSBURG TIMES, Apr. 15, 2000, at 1A.

68. *Id.*

69. Act of February 13, 1801, ch. 4, 2 Stat. 89.

70. 5 U.S. (1 Cranch) 137 (1803).

71. Wythe Holt, *Separation of Powers?: Relations Between the Judiciary and the Other Branches of the Federal Government Before 1803*, in NEITHER SEPARATE NOR EQUAL: CONGRESS IN THE 1790S, at 183, 184 (Kenneth R. Bowling & Donald R. Kennon eds., 2000). Holt goes on to say:

The justices of the Supreme Court in the 1790s understood "separation of powers" in terms of the relations of power. They saw it as a matter of balancing power against power, not as a matter of strict separation. . . . First, [separation] required interaction between branches when circumstances made interaction necessary in order to prevent encroachment. Second, when there was no danger of encroachment, nothing prevented members of the branches from acting together, and such might even be necessary in order to engage in an equally important endeavor: protecting the government against its enemies. It would be up to the judgment of the members of any branch as to which circumstances constituted encroachment and which circumstances provoked a need to work together.

Id. at 186; see also Anthony Taibi, Note, *Politics and Due Process: The Rhetoric of Social Security Disability Law*, 1990 DUKE L.J. 913, 958. Taibi notes that

[t]hroughout American history, judges have acted in overtly political roles. During the early national period, Supreme Court Justice Samuel Chase, for example, actively campaigned for President John Adams while on the Court. John Jay served as envoy to resolve the continuing British-American dispute at the same time that he also served as Chief Justice. John Marshall also served as Secretary of State during his tenure on the bench. While President, George Washington freely consulted with sitting Justices

Second, many state governments function under constitutions that contain explicit definitions of the division of responsibility among the branches which are hardly driven by jurisprudential theories about federal “separation of powers.” The Indiana Constitution, for example, does not even use the term “separation.” It says that powers are “divided” among the branches.⁷² Provisions like these suggest that appropriate inter-branch behavior rightly varies from place to place.⁷³

Third, some conversations between judges and legislators plainly do no harm and much good. A few years ago, a member of Indiana’s General Assembly (who has since risen to a high position of leadership) came to see whether I could answer a question. He assured me that he would understand if I were not at liberty to talk with him. He explained that the legislature was considering a bill that would affect the authority of high school athletic associations. This issue had been before our court before and was likely to reappear.

This member asked if I could explain a term the lobbyists and legislators kept bandying about: “state action.” He knew that it was an important part of the debate, but it was not a part of his own lexicon. I answered his fairly straightforward question by providing a brief explanation of this bedrock Fourteenth Amendment concept.

Whether or how this legislator ever put the information to use, I do not know. What I do know is that he left my office more knowledgeable about an important issue with statewide implications. I think that our conversation was ethically appropriate, and I would like to believe that it led to a more informed legislative decision. I also know that the legislator was grateful for the chance to obtain a neutral answer in a private setting.

The Model Code of Judicial Conduct does not offer specific guidance on such encounters.⁷⁴ We must trust our own instincts to avoid conflicts and simply

of the Supreme Court, treating them as he did his other informal advisors. Although not entirely without controversy at the time, these examples show that the Framers expected federal judges to be engaged in the formulation and implementation of policy.

Id. (citations omitted).

72. “The powers of the Government are divided into three separate departments; the Legislative, the Executive including the Administrative, and the Judicial: and no person, charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided.” IND. CONST. art. III, § 1.

73. See Ellen A. Peters, *Getting Away From the Federal Paradigm: Separation of Powers in State Courts*, 81 MINN. L. REV. 1543 (1997). Peters observes that

even though state constitutional provisions may textually resemble those found in the federal Constitution, they may reflect distinct state identities that will result in differences in how courts apply and construe such texts. Far from being arbitrary departures from a superior federal model, these interpretations have the legitimacy of differences rooted in the past and adaptable for the future.

Id. at 1553.

74. Nearly all states have adopted some version of this Code. Steven Lubet, *Judicial Discipline and Judicial Independence*, 61 LAW & CONTEMP. PROBS. 59, 60 (1998).

do our best to serve all of our diverse constituencies.

VIII. "PERKS" FOR JUDICIAL CLERKS

One ethical issue of fairly recent vintage involves judicial clerks. In Texas, large law firms have customarily recruited state supreme court clerks with promises of \$35,000 bonuses, payable when they move from the court to the firm.⁷⁵ The Texas court has accounted for problems such as potential favoritism by disqualifying clerks from cases involving their future employers, but the policy is informal and the court does not keep any records of such situations.⁷⁶

Attorneys from smaller firms that cannot afford to be as generous have cried foul. One large Texas firm has discontinued the bonuses; others have continued and defended the practice, and a prolonged controversy has ensued.⁷⁷

Other forms of payment may also come under question. Last year, Arizona's Judicial Ethics Advisory Committee banned law firms from paying clerks' bar association dues, "to avoid any appearance that the payment is related to the service as a law clerk."⁷⁸

It seems likely that states will move toward more formal policies on what appellate judicial clerks may accept. Incentives can take many forms, and it is important to handle situations consistently and to provide clear guidance to firms, judges, and clerks.

IX. A NOTE ABOUT JUDICIAL ELECTIONS

Volumes have been written on the problems that judicial elections create with respect to judicial independence, and I will not attempt comprehensive treatment here.⁷⁹ Still, I would be remiss if I failed to re-emphasize that states with appointed judges avoid some of the most serious ethical issues, such as whether a judge should recuse herself if a campaign contributor is significantly affected by a case, and where free speech stops and impermissible promises begin.

It is relatively easy to posit examples of the judge who succumbs to the powerful and inevitable pressure to take a position on issues during an election campaign. When a judicial candidate says, "Fathers should get custody more often," a mother who later loses custody of her child is unlikely to believe that she received a fair hearing from that judge.

It seems abundantly clear that, if judicial ethics are the primary consideration, states that elect appellate judges should rethink the relative advantages and disadvantages.

75. Elizabeth Amon, *DA Probes Clerk Signing Bonuses*, NAT'L. L.J., Jan. 29, 2001, at A1.

76. *Id.*

77. *Id.*

78. Ariz. Sup. Ct. Judicial Ethics Advisory Comm. Opinion 00-03 (May 3, 2000), available at <http://www.supreme.state.az.us/cjc/ethics/00-03.pdf>.

79. See Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 GEO. J. LEGAL ETHICS 1059 (1996).

CONCLUSION

Judges too seldom talk to each other in formal ways about ethical issues. One noteworthy exception to the norm is the Seventh Circuit's *Standards for Professional Conduct Within the Seventh Federal Judicial Circuit*.⁸⁰ The last page of this document is titled "Courts' Duties to Lawyers."⁸¹ The Seventh Circuit has adopted twelve principles, one of which is: "We will not employ hostile, demeaning, or humiliating words in opinions or in written or oral communications with lawyers, parties, or witnesses."⁸² All appellate judges would do well to adhere to such ethical standards which go beyond the letter of the code of conduct.

Judge Learned Hand wrote in 1935: "Let [judges] be severely brought to book, when they go wrong, but by those who will take the trouble to understand."⁸³ The problem, in this age of sound bytes and channel surfing, is that we cannot always count on the public to take the trouble to understand the complexities of judicial life.

It is easy enough to blame our woes on the media or on the modern political climate. As Professor Paul Carrington points out, "[t]he journalism profession now maintains a reward system directed primarily at revealing alleged misdeeds of public persons and to punish any of its members who speak well of public persons."⁸⁴

But is this a really a recent phenomenon? In Roscoe Pound's famous 1906 speech to the American Bar Association he opined that public dissatisfaction with the administration of justice was due in part to "public ignorance of the real workings of courts due to ignorant and sensational reports in the press."⁸⁵ *Plus ça change, plus c'est la même chose*.

Regardless of the climate of the times, we must summon up our own resources to bolster the integrity of the appellate judiciary. Clothes, it has been said, make the man (or the woman). I suggest that, for a judge, the opposite is true. It is the judge who brings honor to the garment and the institution that it represents. We earn the privilege of wearing the robe through respect for our colleagues and all those who have come before us, and by diligent impartiality. If we live by that credo, we never need to fear being burned by the heat of the public spotlight.

80. Available at <http://www.ca7.uscourts.gov/conduct.pdf>.

81. *Id.*

82. *Id.*

83. Learned Hand, *How Far Is a Judge Free in Rendering a Decision?* (1935), reprinted in *THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND* 103, 110 (Irving Dilliard ed., 3d ed. 1960).

84. Carrington, *supra* note 24, at 107.

85. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice, Address at the Convention of the American Bar Association* (Aug. 26, 1906), in 35 F.R.D. 273, 289 (1964).

THE PRACTICE OF PRECEDENT: ANASTASOFF, NONCITATION RULES, AND THE MEANING OF PRECEDENT IN AN INTERPRETIVE COMMUNITY

LAUREN ROBEL*

Like sailing, gardening, politics, and poetry, law and ethnography are crafts of place: they work by the light of local knowledge. The instant case, *Palsgraff* or the *Charles River Bridge*, provides for law not only the ground from which reflection departs but also the object towards which it tends, and for ethnography, the settled practice, potlatch, or couvade, does the same. Whatever else anthropology and jurisprudence may have in common—vagrant erudition and a fantastical air—they have in common the artisan task of seeing broad principles in parochial form. “Wisdom,” as an African proverb has it, “comes out of an ant heap.”¹

INTRODUCTION

What does it mean to say that a decision by a court is, or is not, precedential? At the most straightforward level, to describe a decision as “precedent” is to say that the decision must be acknowledged, at the least, by the court that issues it; a decision is precedential if courts are bound to follow it or distinguish it, given certain conditions.² When courts adopt rules, as have most appellate courts, which dictate that certain decisions are not precedent, they adopt legal rules about which we can either agree or disagree on the usual grounds—fairness,³ utility,⁴ accountability,⁵ predictability,⁶ and the like.

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1. CLIFFORD GEERTZ, *LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY* 167 (1983).

2. For what remains the most thorough explication and critique of the argument from precedent, see Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987).

3. See, e.g., Lauren K. Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals*, 87 MICH. L. REV. 940 (1989) (discussing differential access to unpublished opinions between government litigants and others). For an argument that publication rules are not the “rules,” because there are no sanctions for violating them and no true policing mechanisms, see Mitu Gulati & C.M.A. McCauliff, *On Not Making Law*, 61 LAW & CONTEMP. PROBS. 157, 164 (1998).

4. See, e.g., Douglas A. Berman & Jeffrey O. Cooper, *In Defense of Less Precedential Opinions: A Reply to Chief Judge Martin*, 60 OHIO ST. L.J. 2025, 2040 (1999) (arguing that nonprecedential decisions could aid in law development); Alex Kozinski & Stephen Reinhardt, *Please Don't Cite This!*, CAL. LAW., June 2000, at 44 (arguing that the primary purpose of

But, as the quotation from Geertz suggests, rules exist within bodies of practice, discrete cultures, and interpretive communities⁷ that give them meaning. In a deeply common-law system such as ours, precedent is also a practice that places requirements on both lawyers and judges. Moreover, the practice of precedent does not rely on the above-stated rule of judicial acknowledgment because, at least linguistically, we refer to all decisions that might have persuasive force as “precedent,” despite the lack of a legal rule requiring either adherence to them or an attempt to distinguish them. Courts also routinely treat nonbinding authority as precedent, in the sense that they feel an obligation to attempt to distinguish that authority. Although it is common for judges to write that they are bound by precedents with which they disagree, it is rare for a court to dismiss the relevance of a cited case for the sole reason that it is not required, by the narrow legal rule of *stare decisis*, to follow that case’s holding. Our cultural conception of precedent, then, includes more than a sense that opinions have predictive value. It also includes shared understandings of the judicial role, which include burdens of justification. Thus, “precedent” can have multiple meanings, both linguistically and practically.

One important interpretive community for judicial opinions, lawyers and judges, has recently renewed the debate about the meaning of precedent, as the result of a short-lived federal appellate decision holding unconstitutional the practice of condemning certain of a court’s opinions to nonprecedential status.

In this essay, I examine the concrete practices that surround appellate courts’ publication rules and the common cultural commitments, as expressed through those practices, that lawyers and judges share about the meaning of judicial

noncitation rules is to permit judges to deal expeditiously with caseloads). That caseloads require nonpublication is asserted even by judges who oppose the noncitation rules. *See, e.g.,* Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS 219, 221 (1999). However, the publication practices of the various appellate courts suggest that the rate of publication is dictated more by local norms than by caseload. *See* discussion *infra* Part I; *see also* Danny J. Boggs & Brian P. Brooks, *Unpublished Opinions & the Nature of Precedent*, 4 GREEN BAG 2D 17, 19 (2000) (arguing against justifying “on high theory a practice that is in fact justified for simple efficiency reasons”).

5. *See, e.g.,* THOMAS E. BAKER, *RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS* 128-29 (1994); William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 282-83 (1996).

6. *See, e.g.,* Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 VAND. L. REV. 71, 113-15 (2001) (demonstrating substantial intercircuit variation in the application of rules on the publication of opinions).

7. An interpretive community is a group of readers that share understandings because of common cultural commitments. *See generally* STANLEY FISH, *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* (1989); William S. Blatt, *Interpretive Communities: The Missing Element in Statutory Interpretation*, 95 NW. U. L. REV. 629 (2001) (applying the concept to legal interpretation).

decisions. Evidence from the federal appellate system shows that large numbers of participants in that system claim to behave in ways that would make sense only if unpublished (and therefore nonprecedential) opinions⁸ are, in some sense that I will explore, precedential. Those participants include not only lawyers who practice in the federal appellate courts but also the judges themselves and the publishers who provide for the opinions' pervasive dissemination.⁹ This evidence suggests that lawyers and judges value these opinions despite the rules limiting citation. This valuation, in turn, suggests a cultural, rather than a rule-bound, conception of stare decisis.

I then examine the Eighth Circuit's opinion in *Anastasoff v. United States*,¹⁰ which has served as a focal point for a renewed discussion of citation bans both inside and outside of the judiciary. *Anastasoff* raises fundamental questions about the meaning of precedent and the judicial role, and has been the wellspring of recent judicial criticism of citation rules in the federal appellate courts. *Anastasoff* and its progeny confirm that our cultural commitment to precedent includes a normative commitment to justification.

Finally, I briefly examine the argument against abandoning the courts' current publication and citation rules—chiefly the argument that such rules are required by caseload—and find that it is less persuasive than commonly thought. More importantly, it is less compelling than the damage to the courts' perceived legitimacy that results from the continuation of the publication and citation rules in their current form. For many participants in the federal appellate system, uncitable opinions are part of the daily diet of cases that they examine and analyze in practice. The ban on their citation strikes at the metaphorical heart of the common-law system.

8. In this essay, I will refer to those opinions that are designated nonprecedential opinions by federal appellate court rule as “unpublished.” Though I use the term “unpublished opinions,” it is important to note that I am referring to those opinions that have been designated uncitable by rule and, therefore, not submitted for publication in an official reporter.

9. These opinions are widely available in searchable databases such as Westlaw and Lexis, see Michael Hannon, *Developments and Practice Notes: A Closer Look at Unpublished Opinions in the United States Courts of Appeals*, 3 J. APP. PRAC. & PROCESS. 199, 209 n.48 (2001). “Westlaw estimates there are about 336,000 unpublished federal appellate opinions in its case databases.” *Id.* Others appear in commercial specialty reporters. *Id.* at 206. See also Boggs & Brooks, *supra* note 4, at 18 (2000) (“The ‘unpublished opinions’ debate . . . is badly misnamed. Between Lexis and Westlaw, Internet sites maintained by universities and some of the circuit courts of appeals, and networks of attorneys practicing in particular fields, it is the rare opinion that is not disseminated for mass consumption.”)

10. 223 F.3d 898 (8th Cir. 2000), *vacated*, 235 F.3d 1054 (8th Cir. 2000) (en banc). In its subsequent rehearing en banc, the Eighth Circuit stated, “The constitutionality of that portion of Rule 28A(i) which says that unpublished opinions have no precedential effect remains an open question in this Circuit.” *Anastasoff*, 235 F.3d at 1056.

I. THE UNIVERSE OF PRECEDENT AND THE WORLD OF UNPUBLISHED OPINIONS

In the federal courts of appeals, widespread citation and publication restrictions date from 1976, when the Commission on Revision of the Federal Court Appellate System recommended that such restrictions be adopted to deal with caseload volume and the "proliferation of precedent."¹¹ In state intermediate appellate courts, the use of citation and publication restrictions is yet more recent.¹² Thus, federal appellate courts have about twenty-five years of experience with publication and citation rules, and all have adopted limited publication plans and limitations on citation.¹³ Those courts now publish decisions in the official reporters in only thirty-four percent of all cases in which appellants had counsel and in only twenty-three percent of cases overall.¹⁴ In addition, the rates of publication, as shown in Table 1,¹⁵ vary widely from a low of seventeen percent for the Eleventh Circuit, to a high of seventy-one percent for the Seventh Circuit.¹⁶

The rationale for publication and citation rules has shifted as a result of experience with those rules. When the rules were first suggested to the Judicial Conference of the United States Courts in 1964, the rationale was the prosaic one of dealing with "the ever increasing practical difficulty and economic cost of establishing and maintaining accessible private and public law library facilities."¹⁷ The 1975 Commission on Revision of the Federal Court Appellate

11. Publication and citation rules in the federal appellate courts had their genesis earlier, in a 1964 Judicial Conference resolution permitting federal courts to limit publication, but most publication regimes date from the report of the so-called Hruska Commission. See COMM'N ON THE REVISION OF THE FED. CT. APP. SYS., STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE—A PRELIMINARY REPORT (1975) [hereinafter COMM'N PRELIMINARY REPORT]; Robel, *supra* note 3, at 945; Hannon, *supra* note 9, at 207-08 (discussing timeline for federal court publication rules); *id.* at 253-85 (compiling state and federal court citation bans).

12. "As of 1981, only sixteen states operated under a nonpublication regime." David M. Gunn, "Unpublished Opinions Shall Not Be Cited as Authority": *The Emerging Contours of Texas Rule of Appellate Procedure 90(i)*, 24 ST. MARY'S L.J. 115, 124 (1992). In 1968, thirty states still published opinions in all of their cases, as opposed to eighteen in 1974 and only six by 1989. Thomas B. Marvell, *State Appellate Court Responses to Caseload Growth*, 72 JUDICATURE 282, 288 (1989).

13. See Hannon, *supra* note 9, at 253-57. Nine federal circuits ban citation of "unpublished" dispositions as precedent, except in related cases to establish a defense of *res judicata* or for similar reasons. Three circuits allow citation to these opinions as persuasive authority, and two, though disfavoring citation, permit it if no published opinion would serve as well.

14. See COMM'N ON STRUCTURAL ALTERNATIVES FOR THE FED. CTS. OF APPEALS, WORKING PAPERS 112 (1998) [hereinafter WORKING PAPERS].

15. See tbl.1, *infra*.

16. I will return to this table in the discussion of circuit publication cultures *infra*.

17. REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

System, commonly known as the Hruska Commission, approached its recommendations for limited publication from the perspective of caseload crunch. While repeating the idea that there were library cost savings to be had from limited publication,¹⁸ that Commission suggested that judges could accrue significant time savings with limited publication, “for the judges no longer sense the same need to polish the prose and to monitor each phrase as they do with opinions which are intended for general distribution.”¹⁹ In its final report, the Commission linked its recommendation for adopting limited publication plans to the time opinions take to write and the possibilities for reduced appellate case processing time.²⁰

Recognizing that appellate courts serve both lawmaking and dispute-resolving functions, the plans that courts adopted all followed similar criteria, attempting to distinguish in advance between opinions that make law and those that merely apply it.²¹ While there were variations (for example, some courts counseled publication when a case involved an issue of continuing public interest), the central rationale of all the plans was that non-lawmaking opinions need not be published.²² Despite the similarities in criteria, however, the circuits quickly diverged in the percentage of opinions each published and made citable.

By the time the Federal Courts Study Committee completed its work in 1990, and despite the huge increase in the federal appellate caseload that in part prompted that Committee’s work,²³ fifty-eight percent of federal appellate judges believed that they almost always produced published opinions in the cases in which they “should be written.”²⁴ Another thirty percent believed that they only “sometimes” had to forgo writing opinions for publication in cases in which they “should be written,” presumably because of caseload pressures.²⁵ Given the significant variations in publication rates across circuits both then and now, these figures suggest divergent local norms with respect to what cases meet the criteria

11 (1964) (reporting, in light of these concerns, a Judicial Conference resolution “[t]hat the judges of the courts of appeals and the district courts authorize the publication of only those opinions which are of general precedential value and that opinions authorized to be published be succinct.”).

18. COMM’N PRELIMINARY REPORT, *supra* note 11, at 72 (“When large numbers of such opinions [with limited precedential value] find their way into the reports, they create logistical problems in terms of sheer space and library maintenance expenditures, and the burden of fruitless research is compounded.”).

19. *Id.*

20. COMM’N ON REVISION OF THE FED. CT. APP. SYS., STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE—FINAL REPORT 50 (1975) [hereinafter COMM’N FINAL REPORT].

21. Robel, *supra* note 3, at 941.

22. *Id.*

23. The Committee itself described caseload as a “crisis.” REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 4 (1990).

24. 2 FED CTS. STUDY COMM., WORKING PAPERS AND SUBCOMMITTEE REPORTS 87 (1990).

25. *Id.*

for publication of the various appellate courts' plans.²⁶ This divergence exists despite the striking similarities among the plans themselves and the fact that each contained criteria for predicting which cases were likely to have sufficient lasting value as precedent to justify the additional thought and effort required for published decisions.²⁷ Although the publication rates reported in Table 1 suggest some connection between workload and publication rates (for example, the Eleventh Circuit, which has more merits terminations per judge than any other, also has the lowest publication rate), that connection is neither tight nor obvious. For instance, the Fourth Circuit's publication rate of nineteen percent is very low given its also low workload rank, and the Eighth Circuit's publication rate is relatively high despite its high workload rank.

Publication limits are coupled in most circuits with citation bans, which vary in severity.²⁸ Citation bans have been controversial from the beginning. The Hruska Commission believed that such bans were necessary to discourage commercial publication (which it believed would undermine cost savings associated with writing less polished opinions)²⁹ and more fundamentally, to deal with the problem of unequal access to these opinions.³⁰ However, it noted that there were members of the bar and bench who "consider[ed] it undesirable and indeed improper for a court to deny a litigant the right to refer to action previously taken by the court."³¹ Nevertheless, citation bans were adopted almost exclusively because of concerns about unequal access to unpublished opinions. The Hruska Commission feared "that the publication plans would result in a secret body of applicable and pertinent law available only to certain advantaged litigants and the courts before which they routinely appeared."³²

II. THE PRACTICE OF PRECEDENT: WHAT LAWYERS AND JUDGES DO

Publication plans were intended to make certain opinions disposable by identifying those cases that would add no new information to the canon of substantive law, while limiting citation to those opinions to ensure that lawyers would not spend time reading them and considering their impact or relationship

26. Lauren K. Robel, *Caseload and Judging: Judicial Adaptations to Caseload*, 1990 BYU L. REV. 3, 55 (noting a changing "collective sense of what constitutes 'appropriate' attention to a case . . .").

27. *Id.* at 50.

28. Melissa M. Serfass & Jessie L. Cranford, *Federal and State Court Rules Governing Publication and Citation of Opinions*, 3 J. APP. PRAC. & PROCESS 251, 253-85 (2001).

29. COMM'N FINAL REPORT, *supra* note 20, at 51 ("To allow litigants to cite opinions which the court has designated as 'not for publication' invites publication by private publishers, thus defeating the basic purposes of the program.").

30. *Id.* Despite citation bans, the Commission's concerns with unequal access were well-founded. See Robel, *supra* note 3 (reporting on a study of government litigants' use of unpublished dispositions).

31. *Id.*

32. Robel, *supra* note 3, at 946 (recounting testimony before Hruska Commission).

to new cases. But, recent surveys of both litigants and judges in the federal appellate system demonstrate that these rules fail to dissuade substantial numbers of attorneys and judges from these activities.³³ The surveys, developed by the Commission on Structural Alternatives for the Federal Courts (also known as the White Commission, in honor of its Chair, Justice White), were sent to all federal appellate and trial judges, and to a random group of attorneys who had cases before the courts of appeals within a specified time frame.³⁴ The surveys yield important information about the behavior of both the consumers and producers of opinions.

A. Lawyers

The surveys indicate that attorneys do not share the view that there are too many precedential opinions available. When asked to rank a number of possible priorities for courts of appeals, attorneys rank avoiding the “proliferation of published opinions” next to last.³⁵ Further, when asked the most frequent reason for their inability to predict appellate outcomes, as reflected in Table 2,³⁶ fair percentages of lawyers in many circuits said that their difficulty was due to either the lack of circuit precedent on point or a lack of clarity in existing circuit precedent.

More important, in agreement with earlier evidence relating to government attorneys,³⁷ the responses indicate that many attorneys monitor unpublished opinions. Though the reasoning behind the citation and publication rules would predict that a significant number of lawyers would regularly read all of the published opinions in their circuits, at least in their fields (Table 2, Column 3),³⁸ they would hardly predict that twenty to twenty-five percent of attorneys in five circuits would do the same with unpublished opinions (Table 2, Column 4).³⁹ Moreover, if the unpublished opinions come up in research in preparation for an actual case, the numbers of lawyers who report that they read the opinions jumps

33. I have previously argued that lawyers are not dissuaded from using unpublished opinions by rules against citation, because the nonpublication rules select cases for publication on the basis of mistaken assumptions about the nature of precedent. I identified three assumptions that I believed were mistaken: that only lawmaking and not dispute-resolving opinions give lawyers important information; that the only opinions that are important are those that create, rather than apply, rules; and that the plans would operate neutrally with respect to the subject-matter of opinions. See Robel, *supra* note 3, at 947.

34. The Commission published both its *Final Report* and *Working Papers* in 1998. The survey results are reported in the *Working Papers*. The response rate for each of the surveys was high: eighty-six percent for appellate judges; eighty-one percent for district judges; and fifty-one percent for appellate counsel. WORKING PAPERS, *supra* note 14, at 3.

35. *Id.* at 81-82. It was narrowly edged out of last place by attorneys’ lack of interest in “mediation or pre-argument conferencing.” *Id.*

36. See tbl.2, *infra*.

37. See Robel, *supra* note 3, at 957-59.

38. See tbl.2, *infra*.

39. See *id.*

significantly (Table 2, Column 5).⁴⁰ In no circuit do fewer than twenty-eight percent of responding attorneys read these cases, and in seven circuits over forty percent read them.

Indeed, Table 2, Columns 4 and 5,⁴¹ when taken together, suggest that significant percentages of lawyers do not feel free to ignore these opinions either generally or with respect to specific cases. If we assume that lawyers are not reading these opinions as a leisure activity, then the most plausible alternative is that they are reading them because they provide useful information in support of their clients' cases. Two lawyers from an eminent law firm make the point succinctly:

It is true that citation prohibitions allow lawyers and courts to ignore unpublished opinions with the confidence that they have not overlooked binding precedent. There are two reasons, however, why this concern is minimal. First, for many issues, there are few on-point but uncitable appellate decisions, so the time it takes to review these decisions is short. For the most part, the myth that there exist great batches of redundant unpublished appellate cases is true only in certain discrete areas of law where meritless cases are litigated even to appeal Second, in practice, citation prohibitions hardly ease the case-review burden on the prudent practitioner. Practitioners often review uncitable cases to mine them for new ideas. A prudent lawyer also reviews unpublished cases, lack of precedential value aside, because they indicate how the appellate court has ruled in the past and thus might rule in the future. Moreover, it behooves counsel to review unpublished opinions because they still may influence a court that reads (or remembers deciding) them itself.⁴²

For these lawyers and others like them, the rule-based conception of precedent embodied in "citation prohibitions" is almost beside the point because their practice is based on a cultural conception of precedent that views all decisions as evidence of reasoning that might be persuasive in the future. True, the citation rules might save the lawyer who ignores unpublished opinions from charges of malpractice (giving them "confidence" that they can be ignored), but it simply is not consistent with "prudent" practice in a common-law environment to ignore these opinions.

Moreover, other evidence strongly suggests that, even under a rule-based conception of precedent, lawyers are correct to read these opinions. A recent study found that unpublished opinions are routinely (indeed, promiscuously) cited by the federal courts of appeals and relied upon by the federal district courts.⁴³ The study found that the courts of appeals have cited unpublished

40. *See id.*

41. *See id.*

42. Salem M. Katsh & Alex V. Chachkes, *The Constitutionality of "No Citation" Rules*, 3 J. APP. PRAC. & PROCESS, 287, 301-02 (2001). The authors, attorneys at Shearman & Sterling, argue that citation bans violate the First Amendment.

43. *See Hannon, supra* note 9, at 235 tbl.6; *see also* Johns v. State, 35 P.3d 53, 65 (Alaska

dispositions (usually their own) 4460 times, and that 3161 federal district court opinions cite unpublished federal circuit court opinions, relying on them for legal support in 1967 cases.⁴⁴ In this light, it is rational for lawyers to stay apprised of unpublished dispositions, for they often explicitly influence outcomes. It is impossible to determine how much more often they influence outcomes more subtly.

The survey responses of appellate and district court judges confirm that lawyers are not the only ones taking notice of “noncitable” opinions on a regular basis.

B. Judges

As Table 3, Column 2⁴⁵ shows, many district judges regularly read *all* of the unpublished opinions from their circuit courts. When significant numbers of district judges report regularly reading these opinions, it suggests that they are doing so to predict how their court of appeals would decide an issue. In some instances, district judges may be forced to monitor these opinions because their circuits provide so little published caselaw. In the Fourth Circuit, for instance, where the published corpus represents only nineteen percent of the merits terminations, almost sixty percent of the district judges monitor all or most of the unpublished appellate opinions. In circuits with higher publication rates, like the Eighth Circuit, the relatively high number of district judges reporting that they regularly read the unpublished opinions might suggest problems with the application of the rules. My working hypothesis is that these district judges are not behaving irrationally, so if they are reading the opinions regularly, they must believe that the decisions either predict outcomes or provide direction. In five of the circuits, twenty percent or more of the district judges regularly read unpublished opinions.

The survey also asked the district court judges whether there were issues or areas of circuit law that were particularly inconsistent or difficult to know. As shown in Table 3, Column 3,⁴⁶ affirmative responses to this question varied by circuit, from a low of thirteen percent in the First Circuit to a high of fifty-seven percent in the D.C. Circuit. The judges indicated that the difficulty they faced was largely due to inconsistencies among published opinions, but in five circuits, twenty-four percent to over forty percent of the judges attributed difficulty to inconsistencies between published and unpublished opinions. These numbers

Ct. App. 2001) (Mannheimer, J., concurring) (noting that Alaska’s lower court judges routinely rely on unpublished Alaska opinions).

44. Hannon, *supra* note 9, at 235. Hannon believes the last figure to be a conservative estimate because he counted only those cases where the court “explicitly cited the unpublished case for legal authority.” *Id.* For these courts, *Anastasoff* was something of a relief: several cite it for the proposition that their discussion of unpublished opinions is not improper. *See, e.g., McGuinness v. Pepe*, 150 F. Supp. 2d 227, 235 (D. Mass. 2001).

45. *See* tbl.3, *infra*.

46. *See id.*

suggest that the judges are not only monitoring the opinions, but also are analyzing them in light of existing published opinions in an attempt to predict the development of doctrine within their circuits. Additionally, district judges are as skeptical as lawyers about their ability to find a precedent when they need one. As shown in Column 4,⁴⁷ in eight circuits, twenty percent or more of the judges attributed the inability to know an area of law in their circuit to the lack of precedent.

Appellate judges are also consumers of unpublished appellate opinions. There are three reasons why appellate judges might devote time to reading most "nonprecedential" opinions. First, they may feel obligated to monitor the application of their circuit's publication rule. Second, they may feel a duty to stay abreast of the overall work of their courts. Finally, they may believe that there is important information contained in the opinions that is not available elsewhere.

It seems most plausible that appellate judges read unpublished opinions to monitor compliance with publication rules. The publication rates, as noted earlier, suggest that, among the courts of appeals, there are different cultures with respect to publication. As shown in Table 3, columns 1 and 2,⁴⁸ with one notable exception, the courts with the strongest commitments to publication (the First, Seventh, Eighth, and D.C. Circuits) also have the highest number of judges reporting that they read unpublished opinions.⁴⁹ These results suggest that those courts continue to be less comfortable with nonpublication and monitor unpublished opinions more closely to ensure compliance with the rules (these figures do not, however, demonstrate that they are successful in achieving compliance; we need to look to the lawyer-consumers of the opinions for that information).

Proponents of citation and publication plans hoped, apparently in vain, that the plans would work so well that the unpublished opinions' inherent worthlessness would discourage their use.⁵⁰ Appellate courts have tried several unsuccessful strategies to discourage the use of unpublished opinions. In the early days of the plans, they attempted to withhold these opinions from commercial publishers, reasoning that lawyers could not cite what they could not find.⁵¹ Commercial publishers have, however, responded to demand for the opinions and now, with few exceptions, unpublished opinions are generally available in the searchable electronic databases.⁵² The opinions are also available

47. *See id.*

48. *See id.*

49. The one exception is the Fourth Circuit, which has almost the lowest rate of publication and where half of the appellate judges regularly read the unpublished opinions.

50. *See Robel, supra* note 3, at 944.

51. *See id.* at 944-45.

52. *See Hannon, supra* note 9, at 210-13. The Third, Fifth, and Eleventh Circuits "have banned electronic dissemination of unpublished opinions, and these cases are neither added to Westlaw or LEXIS nor available from the courts' websites." *Id.* at 211. Hannon found, however, that a large number of unpublished opinions from these circuits are in fact available in Westlaw's

on court websites and in specialty reporters.⁵³

Courts have also tried simply not writing opinions at all.⁵⁴ However, this option proved unattractive to litigants and judges alike,⁵⁵ because to strip opinions of all rationale is to leave them vulnerable to claims of lack of accountability. And since nonpublication is so routinely coupled with lack of oral argument, neither litigants nor lawyers can discern whether the court either understood or acknowledged their arguments.⁵⁶ As I will discuss below, the failure to write an opinion at all is inconsistent with deeply-held conceptions of the judicial role.

III. FRACTURES IN THE INTERPRETIVE COMMUNITY: *ANASTASOFF* AND THE RENEWED DEBATE

The evidence from every quarter is that substantial numbers of those involved with the federal appellate courts—judges, litigants, and publishers alike—do not sharply distinguish in their practices between published, citable opinions, and unpublished, noncitable opinions. The one glaring exception is that the latter cannot be cited by lawyers, although they are apparently often cited by courts. Also, because the judges are reading unpublished opinions, they are also presumably making the judgments that typically attend analysis of opinions: that this case is like or unlike another, well-reasoned or not, persuasive or not. When trial judges, lawyers, and litigants find that their best precedent is one that they are not supposed to cite, they face a clash between the cultural conception of precedent evident in their behavior, and the rule-based conception of precedent embodied in citation bans.

In point of fact, the view of precedent embodied in the publication rules is itself both cultural and rule based. These rules typically couple a command (i.e., citation is banned or limited) with a set of goals for nonpublication that echo a practice-based view of precedent. Characteristic of these rules, the First Circuit couples a citation ban with a set of guidelines that attempts to identify those opinions that would “serve . . . as a significant guide to future litigants,” because they articulate a new rule of law or modify an established rule.⁵⁷ The Second Circuit describes the goal as the attempt to predict “those cases in which . . . each

CTA database. *See id.* In order to understand how “banning” the dissemination of documents of public record could be possible, one must comprehend the dynamics of the relationship between the courts and legal publishers.

53. *See id.* at 206.

54. Both the Fifth Circuit and the Third Circuit have tried and abandoned this approach. *See* Philip Shuchman & Alan Gelfand, *The Use of Local Rule 21 in the Fifth Circuit: Can Judges Select Cases of “No Precedential Value”?*, 29 EMORY L.J. 195 (1980).

55. *See* Robel, *supra* note 3, at 943 (discussing reasons why courts abandoned summary dispositions).

56. *See* WORKING PAPERS, *supra* note 14, at 110 tbl.8 (noting that only one circuit publishes as many as ten percent of its decisions made without oral argument).

57. 1ST CIR. R. 36(b).

judge of the panel believes that no jurisprudential purpose would be served [by publication].”⁵⁸ The Third Circuit looks for those opinions that have “precedential or institutional value.”⁵⁹ The courts look, in other words, to the future value of the opinions. However, unless the courts publish almost nothing, the future value of what they write is not, culturally speaking, determined by the authoring judge alone; rather, it is determined by consumers. Hence the citation rules, which attempt to strip the opinions of value by fiat.

The rules ask judges through language that echoes the common-law understanding of the meaning of precedent to predict the future value of their opinions to consumers. That common-law understanding itself depends upon consumers’ perception of future value. The rules, therefore, embody the clash between cultural, practice-based views and rule-based views of precedent. It is trivially easy to find examples of cases that, according to the criteria of the publication plans, should have been published, because in hindsight (or perhaps even with foresight) the opinions provide information that consumers would find useful in predicting future outcomes.⁶⁰

One result of the clash between cultural views of precedent and rule-based views is that intermediate appellate courts’ publication practices have been the target of academic criticism for years.⁶¹ But the past year must have set a record for such criticism from outside of the academy. The California Assembly’s Judiciary Committee, for instance, unanimously approved a bill that would have required that “[a]ll final opinions of the Supreme Court, of the courts of appeal, and of the appellate divisions of the superior courts” be “made available for private publication, in full,” and mandated that those opinions “shall constitute precedent under the doctrine of stare decisis the same as opinions published in the official reports.”⁶² The proposed bill, which would have changed the status of over ninety percent of California’s appellate decisions, did not pass the California Assembly, but it did provoke commentary from almost every legal organization in the state. Indeed, an entire website exists to challenge California’s (and every other state’s) nonpublication and no-citation rules.⁶³

Meanwhile, the United States Court of Appeals for the Eighth Circuit held unconstitutional that circuit’s rule condemning unpublished opinions to

58. 2D CIR. R. 0.23.

59. 3D CIR. I.O.P. app. 5.2.

60. This would be true even if the plans worked perfectly to exclude from publication only non-lawmaking opinions, because applications of rules are as important to practitioners as their creation. See Robel, *supra* note 3, at 941-42; see also Boggs & Brooks, *supra* note 4, at 19-20.

61. See generally Thomas E. Baker, *Federal Court Practice and Procedure: A Third Branch Bibliography*, 30 TEX. TECH L. REV. 909, 1092-96 (1999) (citing sources of such criticism).

62. Richard H. Cooper & David R. Fine, *What’s Past is Prologue*, 43 ORANGE COUNTY LAW. 27 (2001) (discussing California Assembly Bill 2404). Cooper and Fine quote a California Legislative Counsel Report, AB 2404 at 4, which states that “93 percent of California Court of Appeal opinions are unpublished and uncitable.” *Id.*

63. See COMMITTEE FOR THE RULE OF LAW, at <http://www.nonpublication.com> (last updated Nov. 3, 2001) (citing articles and collecting information about cases challenging citation bans).

nonprecedential status.⁶⁴ Though that decision was later vacated, it generated enormous discussion,⁶⁵ among both commentators and journalists,⁶⁶ and in other courts.⁶⁷ The *Anastasoff* decision ratchets up the clash between practice and rule, adding another piece to the description of the practice of precedent. It also provides additional insight into why the rather obscure rules on citation have garnered political and popular attention.⁶⁸

A. *Anastasoff*: Precedent Practice as Normative Commitment

Faye Anastasoff sought a \$6000 tax refund, but the government contended that her request for that refund had arrived one day late. Anastasoff argued that her request was timely because it had been mailed before the expiration of the refund period; the IRS disagreed, citing an earlier Eighth Circuit case that had held the so-called mailbox rule inapplicable.⁶⁹ Anastasoff argued that the cited case was unpublished (despite the fact that it had decided an issue of first impression under federal tax law) and, therefore, nonprecedential under the Eighth Circuit's rule.⁷⁰ The Eighth Circuit disagreed, and in an opinion by Judge Richard Arnold, held its own rule on citation unconstitutional "because it purports to confer on the federal courts a power that goes beyond the 'judicial'"

64. See *Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000), *vacated*, 235 F.3d 1054 (8th Cir. 2000) (en banc).

65. A search through the electronic databases for commentary on the Eighth Circuit's opinion reveals a very large amount of interest in this topic from all segments of the practicing bar, from periodicals targeted to corporate counsel to lawyers for the public interest. For compilations of new articles, see COMMITTEE FOR THE RULE OF LAW, *supra* note 63.

66. See, e.g., *Better Not Cite Those Unpublished Opinions Just Yet*, 16 FED. LITIGATOR 41 (2001); Jerome I. Braun, *Eighth Circuit Decision Intensifies Debate over Publication and Citation of Appellate Opinions*, 84 JUDICATURE 90 (2000); David R. Fine, *Keeping Mum Kills Precedents*, NAT'L L.J., Feb. 19, 2001, at A21.

67. See discussion *infra*.

68. *Anastasoff* was not the first case to have considered the constitutionality of citation bans, although it is the first to have issued a direct ruling on a constitutional ground. See Lance A. Wade, *Honda Meets Anastasoff: The Procedural Due Process Argument Against Rules Prohibiting Citation to Unpublished Judicial Decisions*, 42 B.C.L. REV. 695, 712-15 (2001) (detailing previous constitutional challenges and arguing that citation bans violate procedural due process).

69. See *Christie v. United States*, No. 91-2375MN, 1992 U.S. App. LEXIS 38446, at *5-8 (8th Cir. Mar. 20, 1992) (per curiam).

70. See 8TH CIR. R. 28(a)(i). The rule provides that

[u]npublished opinions are not precedent and parties generally should not cite them. When relevant to establishing the doctrines of res judicata, collateral estoppel, or the law of the case, however, the parties may cite an unpublished opinion. Parties may also cite an unpublished opinion of this court if the opinion has persuasive value on a material issue and no published opinion of this or another court would serve as well.

within the meaning of Article III of the Constitution.⁷¹

Judge Arnold's constitutional analysis was both historical and structural. In his view, the founding generation saw the obligation to follow precedent as definitional of judicial power and at the core of what distinguished the judiciary from the political branches.⁷² Moreover, Judge Arnold argued that the obligation to follow precedent served a separation of powers function, by "limit[ing] the judicial power delegated to the courts by Article III,"⁷³ presumably by assuring that judges were not free to behave arbitrarily, but were required to justify their actions in the present by resorting to what they had done in the past—a classically conservative approach to policy. Thus, "[t]he duty of courts to follow their prior decisions was understood to derive from the nature of the judicial power itself and to separate it from a dangerous union with the legislative power."⁷⁴ A departure from the doctrine of precedent, noted Judge Arnold, quoting Justice Joseph Story, "would have been justly deemed [by the Framers] an approach to tyranny and arbitrary power, to the exercise of mere discretion, and to the abandonment of all the just checks upon judicial authority."⁷⁵

Finally, Judge Arnold argued, the rule against treating decisions as precedential violates a principle of equal treatment. The courts, he said, should reject a doctrine that, in essence, states, "We may have decided this question the opposite way yesterday, but this does not bind us today, and, what's more, you cannot even tell us what we did yesterday."⁷⁶

The *Anastasoff* decision carefully avoids two potential misconceptions about its scope. First, Judge Arnold does not advance a view of precedent that requires "eternal adherence" to previous decisions. Rather, he argues, treating all decided cases as precedential puts an appropriate burden of justification on the judiciary.⁷⁷ Second, treating all decisions as precedent does not depend on publication. The Founder's understanding of precedent depended not on publication, a relatively recent practice, but on the existence of a decision. Historically, precedent could be established "only by memory or by a lawyer's unpublished memorandum."⁷⁸ Indeed, argued Judge Arnold, "entry on the official court record [was] sufficient to give a decision precedential authority whether or not the decision was subsequently reported."⁷⁹

71. *Anastasoff v. United States*, 223 F.3d 898, 899 (8th Cir.), *vacated*, 235 F.3d 1054 (8th Cir. 2000) (en banc).

72. *See id.* at 900 ("In sum, the doctrine of precedent was not merely well established; it was the historic method of judicial decision-making, and well regarded as a bulwark of judicial independence in past struggles for liberty.").

73. *Id.*

74. *Id.* at 903.

75. *Id.* at 904 (quoting JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 377-78 (1833)).

76. *Id.*

77. *Id.*

78. *Id.* at 903.

79. *Id.* at 903 n.14.

During *Anastasoff's* brief tenure as a precedent (and even into its ironic demise), federal judges cited it to question the citation bans in their courts and in connection with their own concerns about the application of the publication rules. The Fifth Circuit, for instance, had in an unpublished opinion held that the Dallas Area Rapid Transit (DART) was a state governmental entity entitled to sovereign immunity under the Eleventh Amendment.⁸⁰ A year and a half later, a subsequent panel of the Fifth Circuit (which included one of the judges from the earlier unpublished case) determined that DART was not a state entity and, therefore, not entitled to immunity. The difference, of course, was that the latter decision was released for publication.⁸¹ In dissenting from a petition for rehearing en banc, three judges noted that the continuing “justification for refusing to confer precedential status on [unpublished] opinions is . . . tenuous,” citing the wide availability of such opinions online.⁸²

In the Ninth Circuit, a dissenting judge accused his court of creating a circuit split on the question of the interpretation of a sentencing guidelines, citing both published and unpublished cases.⁸³ The unpublished cases from the Fourth and Seventh Circuits apparently represented the only authority in those circuits interpreting the sentencing guideline as it applied to a particular crime.⁸⁴ In the Fifth Circuit, a district court in Texas published a plea to the court of appeals to reconsider its citation ban, noting that the holding and reasoning of a recent unpublished decision of that court would have decided the case before it (and relying on that decision nonetheless).⁸⁵

What makes these decisions troubling? *Anastasoff's* central insight—albeit an implicit one—is that precedent is not a concept that can successfully be constrained by rule in a deeply, and historically, common-law legal culture such as ours. Judge Arnold approaches this insight from the perspective of producers of opinions, arguing a constitutional duty for a court to acknowledge the authority-in-fact of its own work product. The power of this critique comes from its implicit premise that to do otherwise would be to engage in the arbitrary exercise of authority, because “opinions” are not simply cultural artifacts, but also the actual decisions of the judiciary with respect to the litigants’ lives, liberty, and property. Imagine a worst-case, if fanciful, scenario: two appeals involving the validity of the imposition of the death penalty, on the same

80. See *Anderson v. DART*, 180 F.3d 265 (5th Cir. 1999) (mem.).

81. See *Williams v. DART*, 242 F.3d 315 (5th Cir. 2001).

82. See *Williams v. DART*, 256 F.3d 260, 261 (5th Cir. 2001) (Smith, J., dissenting).

83. *United States v. Lopez-Pastrana*, 244 F.3d 1025 (9th Cir. 2001).

84. See also *United States v. Goldman*, 228 F.3d 942 (8th Cir. 2000) (noting only authority on a sentencing guidelines point in the Eighth Circuit was an unpublished case, but stating that *Anastasoff* required that the case be followed). For a thoughtful discussion in the context of the state system, see *Johns v. State*, 35 P.3d 53, 63-67 (Alaska Ct. App. 2001) (Mannheimer, J., concurring).

85. See *Encore Video, Inc. v. City of San Antonio*, No. Civ.A. SA-97-CA1139FB, 2000 WL 33348240 (W.D. Tex. Oct. 2, 2000); see also *Cmty. Visual Communications, Inc. v. City of San Antonio*, 148 F. Supp. 2d 764, 774 (W.D. Tex. 2000).

grounds, one resulting in reversal—unpublished and therefore uncitable—and the second resulting in affirmance. No one—no judge or litigant—would find this an acceptable proposition. But no-citation policies produce equivalent results, although not so morally outrageous, with regularity. Indeed, the no-citation policy denounced in *Anastasoff* would have, if applied in that case, potentially left Christie, the taxpayer in the unpublished case cited by the government, out-of-pocket an unspecified amount at the same time Anastasoff collected her \$6000, on diametrically opposed—but not disavowed—interpretations of the same statute by the same court.

Whether one agrees with Judge Arnold's constitutional analysis, his opinion describes the process of common-law decisionmaking in deeply cultural terms. To note the depth of our historical cultural commitment to justification may not be compelling constitutional analysis, but it is fine cultural observation. Common-law understandings of precedent entail more than a practical view that all opinions contain information with predictive value. What makes those opinions predictive is the requirement of justification for deviance from them. The normative commitment to justification is as firmly entrenched in our understandings of precedent as is our belief in the predictive value of case results. The publication and citation plans are controversial because they violate every piece of the cultural view.⁸⁶

B. The Contemporary Irrelevance of Publication and Citation Plans

The empirical assumptions underlying publication plans—the assumption that decisions can be sorted into precedential and nonprecedential stacks before they are written, or that such distinctions are even possible—have been widely discredited.⁸⁷ The rationale behind the citation bans—fear of unequal access—has almost evaporated in the electronic age, which makes these opinions both accessible and searchable with the laser-like capabilities of modern legal databases.⁸⁸ Large numbers of participants in the federal appellate system, including judges, use unpublished opinions in ways not contemplated by the publication plans, although completely consistent with common-law understandings of practice surrounding precedent. The sheer numbers of these opinions coupled with the familiarity of judges and lawyers with them have fueled renewed concerns about the legitimacy of both citation bans and courts'

86. This is the simple answer to the question posed by Boggs and Brooks: "One of the great puzzles of the unpublished opinion debate is why so many commentators believe [the argument that citation rules are necessitated by volume] is not good enough." Boggs & Brooks, *supra* note 4, at 19.

87. See, e.g., *id.* (arguing that the publication criteria are unrealistic and unfixable); Robel, *supra* note 3, at 941-44 (making a similar argument).

88. See *supra* note 9 and accompanying text. Even strong supporters of citation bans admit that the distinction between published and unpublished opinions "has become a fine, almost meaningless, distinction in a world of electronic legal research." Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 OHIO ST. L.J. 177, 186 (1999).

claims to exemption from the norm of justifying departures from their earlier decisions.

In the face of *Anastasoff* and similar criticisms leveled by others, several judges and commentators have attempted to rehabilitate publication plans, either by reworking the meaning of precedent,⁸⁹ or by providing alternative rationales for limitations on precedential effect more closely tied to the special roles of intermediate appellate courts.⁹⁰ While intriguing and thoughtful, these attempts to reconfigure a set of court docket practices to other purposes are attempts to rehabilitate a system that should be abandoned.⁹¹

The only remaining argument for citation and publication rules—the argument from caseload—is ultimately unpersuasive. It is unpersuasive not because the caseload claims of the intermediate appellate courts are overstated; they are not.⁹² Though we might romanticize an earlier era, when appellate courts applied more extensive processes to case decision, increased caseload without increased decisional capacity now makes that vision unrealistic. However, saying that courts can do none other than what they do is not the same as saying that the rules governing what they do make contemporary sense.

To see why the argument from caseload is unpersuasive, take it seriously. Imagine that courts continue deciding cases in exactly the same way they are deciding them now, giving to each case exactly the attention it now gets, and writing exactly what they now write, no more and no less. Next imagine that the only change is to the rules that govern what lawyers can do with those opinions.⁹³ What would be lost in abandoning limitations on citation?

Judges make three arguments. First, judges argue that “[t]here is value in keeping [the] body of law cohesive and understandable, and not muddying the water with a needless torrent of published [and therefore citable] opinions.”⁹⁴

89. See, e.g., Kozinski & Reinhardt, *supra* note 4 (arguing that predictive power is in the language and not the fact of a decision, and that judges should be able to control the meaning of precedent by constraining the concept to those opinions that use particular, authoritative kinds of language).

90. See, e.g., Berman & Cooper, *supra* note 4; Douglas A. Berman & Jeffrey O. Cooper, *Passive Virtues and Casual Vices in the Federal Courts of Appeals*, 66 BROOK. L. REV. 685 (2001) [hereinafter Berman & Cooper, *Passive Virtues*]; Boggs & Brooks, *supra* note 4 (the authors are a judge of the Sixth Circuit and an attorney); Kozinski & Reinhardt, *supra* note 4.

91. Cooper & Berman suggest there may be changes to appellate courts’ internal rules that would ease the perceived burden caused by abandoning citation rules. One possibility would be to ease or reconfigure the federal appellate rules regarding the precedential strength of the decision of the first appellate panel to consider an issue. See Berman & Cooper, *Passive Virtues*, *supra* note 90.

92. See *id.*

93. This thought exercise assumes that judges both are serious about their claims that they cannot do more than they are doing now and self-disciplined enough to continue doing it, knowing that all opinions are similarly open to scrutiny.

94. Martin, *supra* note 88, at 192. By using the word “torrent,” Judge Martin may be making a different argument, one closer to the earlier arguments about the problems of searching through

But the value of cohesive and understandable law is that it provides predictability. If it does so only because cases that would “muddy” that cohesiveness are exempt from the norm of judicial justification, it is a false cohesiveness, achieved only by ignoring decisions that create the mud. It therefore provides few of the benefits of predictability, for (as the lawyers quoted earlier already suspect), the picture on the surface is partial.

Second, judges argue that the cases that receive less attention really have little predictive value; indeed, they have negative value. Judges Kozinski and Reinhardt of the Ninth Circuit ask, “[W]hat does precedent mean? Surely it suggests that the three judges on a panel subscribe not merely to the result but also to the phrasing of the disposition.”⁹⁵ Because caseload pressures make it impossible to craft the phrasing of every opinion, and because in their view it is the language and not the result of an opinion that has predictive value, lawyers should stop “[t]rying to extract from [unpublished opinions] a precedential value that we didn’t put into them.”⁹⁶

The assertion that authors, not readers, control the meaning of their writing is theoretically contestable,⁹⁷ and given the history of the publication rules, highly debatable empirically. If the opinions have negative information, in the sense these judges suggest, then busy lawyers trained in common-law methods will not spend time on them. But in the Ninth Circuit, nearly half of the lawyer respondents read these opinions when they come up in their research. This battle has been lost.

Finally, there is the burden on judges of having to read and respond to citations from enlarged sources, and I do not want to discount it.⁹⁸ However, there is a serious counterweight. The wide variation in publication rates among the circuits, coupled with the local variations in the behavior of judges and

reams of decisions articulated by the earliest proponents of the publication plans. Given the views expressed in the White Commission surveys and the actual practices of those respondents, coupled with the efficiency of electronic searches, such an argument has little modern force.

95. Kozinski & Reinhardt, *supra* note 4, at 44.

96. *Id.* at 81. At bottom, these judges argue that the law-development role of the intermediate appellate courts, coupled with the press of caseload, requires that they be able to control the meaning of precedent issued by their court. “Not worrying about making law in 3800 [unpublished opinions each year] frees us to concentrate on those dispositions that affect others besides the parties to the appeal—the published opinions.” *Id.* at 44. Indeed, the claim is even stronger: by focusing on the language rather than the fact of decisions, they claim that “judges—like legislators—have the power to enact prospective legal rules through opinion drafting. Put another way, a judicial decision has only as much precedent as the writing judges intend to give it.” Boggs & Brooks, *supra* note 4, at 22 (discussing Kozinski & Reinhardt article).

97. See, e.g., Blatt, *supra* note 7, at 629 (“A text acquires meaning only by reference to its readers. The shared understanding of such readers constitutes the ‘interpretive community’ for the text.”); FISH, *supra* note 7.

98. Although I suspect the burden is overstated: judges do not currently respond to every case a lawyer cites, and if a previously uncitable case is one that requires a serious response, it is presumably because it makes a serious point.

lawyers shown through the surveys, demonstrates that we are not living in the world imagined by the publication plans. When sixty percent of the district judges in a circuit that published nineteen percent of its decisions feel required to read those decisions regularly, we can no longer talk as if noncitable opinions are a trivial issue. The serious issue is the legitimacy issue that was identified in *Anastasoff*. The growing circle of criticism—beyond the academy and into politics—demonstrates that it is time for the intermediate appellate courts to face up to the plans' infirmities.

CONCLUSION

Law in this country is, in important respects—perhaps in the most important respects—an activity, a practice. Both unburdened and unaided by the tools that might mark it as a discipline—a distinctive set of methodologies or an overarching theoretical paradigm—law gets by nonetheless by creatively scavenging true disciplines and adhering to practices, such as ethical and logical norms that, while not distinctive to law, have served the needs of society adequately, and sometimes spectacularly.

At the metaphorical heart of legal practice, in an historically common-law system like that of the United States, is a commitment to the idea of precedent. That commitment has both advantages and drawbacks,⁹⁹ and in many ways it seems quaint: law is practiced in many places besides courts that have no commitment to the hierarchical and analogical reasoning that play such a part in precedent's role in litigation. But its practical centrality to legal practice in American courts is hardly controversial.

The publication and citation plans widely adopted twenty-five years ago strike at this metaphorical heart. They say to American lawyers that vast numbers of decisions from the appellate courts have less precedential value than, say, a decision from France, which can be freely cited for whatever persuasive value it might have. The plans are not accepted in practice by either judges or lawyers. They should be abandoned.

99. Where to start? At a minimum, precedent offsets optimal justice in individual cases for other values, such as predictability, stability, or cross-case fairness. For what remains the most succinct explication and critique of the argument from precedent, see Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987).

Table 1. Workload and Publication Rates by Circuit, FY 1997

Workload Rank ¹⁰⁰	Circuit	Total # of appeals terminated on merits ¹⁰¹	Merits Terminations by judge ¹⁰²	Publication Rate ¹⁰³
1	Eleventh	3287	274	17%
2	Fifth	3423	201	29%
3	Ninth	4825	172	24%
4	Eighth	1827	166	62%
5	Fourth	2378	159	19%
6	Seventh	1561	142	71%
7	Third	1867	133	22%
8	Sixth	2108	132	25%
9	Second	1687	130	39%
10	Tenth	1374	115	36%
11	First	693	116	61%
12	D.C.	730	61	55%

100. This measure is a rough approximation determined by looking at counseled cases determined on the merits in 1997 per authorized judgeship. WORKING PAPERS, *supra* note 14, at 101.

101. *Id.*

102. *Id.*

103. *Id.* at 112 (cases with counsel only).

Table 2. Appellate Attorney Survey: Selected Responses

Circuit	1. Publication Rate, FY 1997 ¹⁰⁴	2. Citation Problem ¹⁰⁵	3. Read All Published Opinions ¹⁰⁶	4. Read All Unpublished Opinions ¹⁰⁷	5. Read Published if relevant ¹⁰⁸	6. Read unpublished if relevant ¹⁰⁹	7. No precedent ¹¹⁰	8. No clarity ¹¹¹
First	61%	39.4	62%	23%	28	28	55	50
Second	39%	55.7	56	13	35	49	36	53

104. COMM’N FINAL REPORT, *supra* note 20, at 22 tbl.2-7.

105. Percentage of attorneys surveyed who viewed citation restrictions as either a moderate, large or grave problem. *Id.* at 87.

106. Percentage of attorneys surveyed who regularly read all or most of the published opinions of their circuits in at least one or two areas of law. *Id.* at 78.

107. Percentage of attorneys surveyed who regularly read all or most of the unpublished opinions, of circuits in which they regularly practice, in at least one or two areas of law. *Id.*

108. Percentage of attorneys who read published opinions from their circuit that come up in the research of their own cases. *Id.*

109. Percentage of attorneys who read unpublished opinions that come up in the research of their own cases. *Id.*

110. The attorneys’ survey asked, “When you have trouble predicting the outcome of an appeal in this court, what is the most frequent source of that difficulty?” These figures represent the percentage of respondents who replied that their biggest problem was “[l]ack of circuit decisions on point.” *Id.* at 79.

111. The attorneys’ survey asked, “For you or your clients, how big a problem is the difficulty of discerning circuit law due to lack of clear precedent?” These figures represent the percentage of respondents who replied that the problem was “moderate,” to “large” or “grave.” *Id.* at 85.

Table 2. (cont'd)

Circuit	1. Publication Rate, FY 1997	2. Citation Problem	3. Read All Published Opinions	4. Read All Unpublished Opinions	5. Read Published if relevant	6. Read unpublished if relevant	7. No precedent	8. No clarity
Third	22% ¹¹²	48	59	18	33	40	44	52
Fourth	19%	41	62	27	33	41	41	50
Fifth	29%	43	63	14	32	38	40	48
Sixth	25%	40	63	23	30	51	45	58
Seventh	71%	46	63	10	30	43	39	52
Eighth	62% ¹¹³	33	58	22	34	31	40	42
Ninth	24%	39	59	12	36	47	24	55
Tenth	36%	38	57	24	37	40	52	59
Eleventh	17%	40	66	16	31	37	45	47
D.C.	55%	37	62	11	35	38	44	46

112. In the Third Circuit, fifty-three percent of all merits terminations in 1997 resulted in a disposition “without comment.” Of cases decided on the briefs without oral argument, sixty-one percent were decided “without comment.” Only thirty-four percent of the argued cases were decided “without comment.” The Third Circuit’s practices “have recently been changed to largely abandon the use of judgment orders . . .” *Id.* at 111; see also Marci A. Hamilton, *Chief Judge Edward R. Becker: A Truly Remarkable Judge*, 149 U. PA. L. REV. 1237, 1245 (2001) (attributing the change to Chief Judge Becker).

113. In the Eighth Circuit in 1997, fifteen percent of all merits terminations were “without comment” and twenty-eight percent of the cases decided on the briefs without argument were “without comment.” WORKING PAPERS, *supra* note 14, at 111.

Table 3. Appellate and District Court Surveys: Selected Responses

Circuit	Publication Rate, 1997 ¹¹⁴	1. Appellate Judges Read Unpublished Opinions ¹¹⁵	2. District Judges Read Unpublished Opinions ¹¹⁶	3. Inconsistencies Between Published/Unpublished Problem ¹¹⁷	4. No precedent ¹¹⁸
First	61%	44%	26%	0%	50%
Second	39%	8%	9%	9%	13%
Third	22%	13%	10%	24%	34%
Fourth	19%	50%	58%	33%	6%
Fifth	29%	16%	14%	20%	44%
Sixth	25%	28%	20%	35%	57%
Seventh	71%	50%	17%	0%	71%
Eighth	62%	47%	31%	7%	43%

114. *Id.* at 22 tbl.2-7.

115. Percentage of federal appellate judges responding that they regularly read “all” or “most” of their court’s unpublished opinions, either before or soon after they are issued. *Id.* at 15.

116. Percentage of federal district court judges responding that they read “all” or “most” of their circuit court of appeals’ unpublished opinions. *Id.* at 49.

117. Percentage of federal district judges identifying inconsistencies between published and unpublished opinions as contributing to an issue or area of circuit law that is particularly difficult to know. *Id.* at 48.

118. Percentage of district judges who identified a lack of circuit decisions on point as contributing to an area of circuit law that is particularly difficult to know. *Id.*

Table 3. (cont'd)

Circuit	Publication Rate, 1997	1. Appellate Judges Read Unpublished Opinions	2. District Judges Read Unpublished Opinions	3. Inconsistencies Between Published/Unpublished Problem	4. No precedent
Ninth	24%	3%	11%	42%	17%
Tenth	36%	13%	37%	14%	43%
Eleventh	17%	19%	4%	16%	20%
D.C.	55%	60%	18%	25%	13%

CITABILITY AND THE NATURE OF PRECEDENT IN THE COURTS OF APPEALS:

A RESPONSE TO DEAN ROBEL

JEFFREY O. COOPER*

INTRODUCTION

Unpublished opinions have become such a fixture of the appellate landscape that it is hard to recall that, in their present form, they date back only a quarter century.¹ From October 1, 1999 to September 30, 2000, the federal courts of appeals resolved 79.8% of their merits determinations by unpublished opinion,² while unpublished opinions in the state courts numbered in the tens of thousands.³ The use of unpublished, non-precedential opinions commands the support of a substantial number of federal appellate judges,⁴ and its use without complaint by state judges suggests at least passive acceptance in those courts as

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1. See generally Michael Hannon, *A Closer Look at Unpublished Opinions in the United States Courts of Appeals*, 3 J. APP. PRAC. & PROCESS 199, 207-08 (2001) (describing the historical origins of the federal appellate courts' rules for unpublished opinions).

2. See ADMINISTRATIVE OFFICE OF UNITED STATES COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2000 ANNUAL REPORT OF THE DIRECTOR, at tbl.S-3, available at <http://www.uscourts.gov/judbus2000/tables/s03sep00.pdf> (on file with the Indiana Law Review).

3. The Ohio Court of Appeals alone issued well over 5000 unpublished opinions between October 1, 1999, and September 30, 2000, while the unpublished opinions of the Texas Court of Appeals numbered over 6000. To determine these figures, I conducted searches on Westlaw using terms and connectors. The following search in the Ohio state cases database yielded 5886 results: rule 2 /s "unpublished opinions" & da(aft 9/30/1999) & da(bef 10/1/2000). The following search in the Texas state cases database yielded 6393 results: "not designated for publication" /p "unpublished opinions" & da(aft 9/30/1999) & da(bef 10/1/2000). Each search was tailored to capture text that Westlaw included in the headings of unpublished opinions for the respective courts. While I did not check every case found in each search, spot checks of over 100 cases in each database did not reveal a single published opinion.

4. See Edith H. Jones, *Back to the Future for Federal Appeals Courts: Rationing Federal Justice by Recovering Limited Jurisdiction*, 73 TEX. L. REV. 1485, 1494-95 (1995) (book review); Alex Kozinski & Stephen Reinhardt, *Please Don't Cite This!*, CAL. LAW., June 2000, at 43; Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 OHIO ST. L.J. 177 (1999); Diana Gribbon Motz, *A Federal Judge's View of Richard A. Posner's The Federal Courts: Challenge and Reform*, 73 NOTRE DAME L. REV. 1029, 1037-38 (1998) (book review); Philip Nichols, Jr., *Selective Publication of Opinions: One Judge's View*, 35 AM. U. L. REV. 909 (1986). But see Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS 219 (1999) (criticizing the court rules authorizing non-precedential opinions).

well. However, criticism of the practice of issuing non-precedential, unpublished opinions emerged shortly after the practice began⁵ and has swelled periodically in the years since. The wave of criticism recently crested again with the Eighth Circuit's decision in *Anastasoff v. United States*,⁶ in which the panel, in an opinion by Judge Richard Arnold, held that the court's rule declaring unpublished opinions non-precedential violated Article III's definition of the "judicial power."⁷ Dean Lauren Robel, who has previously criticized the use of unpublished opinions as giving an unfair advantage to repeat players in the court system,⁸ now adds a new and powerful critique to the voices calling for reform of the use of unpublished opinions.⁹

Strictly speaking, the dispute is not about unpublished opinions *per se*—even Judge Arnold's decision in *Anastasoff* does not contend that an appellate court must publish in an official reporter every decision it renders.¹⁰ Nor is the dispute about the accessibility of unpublished opinions, at least those of the federal courts. Currently, the unpublished opinions of all but three circuits are available through Lexis and Westlaw; they are "unpublished" in the sense that they do not appear in West's Federal Reporter, but are nonetheless readily available to the legal community.¹¹ Rather, the controversy over unpublished opinions presently concerns the limited degree to which such opinions can be cited as precedent. Dean Robel argues convincingly that the power to define what constitutes precedent does not reside entirely in the hands of the judges who produce particular opinions but rather extends to those in the legal community, lawyers and judges both, who appear to derive value even from those opinions that have been labeled non-precedential.¹² However, her argument ultimately fails to give sufficient weight to the appellate courts' need to exercise some control over the circumstances in which they exercise their lawmaking role—a need that serves one of the principal bases for Judge Kozinski's defense of the Ninth Circuit's

5. See, e.g., William L. Reynolds & William M. Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167, 1189-1206 (1978).

6. 223 F.3d 898 (8th Cir.), *vacated as moot en banc*, 235 F.3d 1054 (8th Cir. 2000).

7. *Id.* at 905.

8. See Lauren Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals*, 87 MICH. L. REV. 940, 946 (1989).

9. See Lauren Robel, *The Practice of Precedent: Anastasoff, Noncitation Rules, and the Meaning of Precedent in an Interpretive Community*, 35 IND. L. REV. 399 (2002).

10. *Anastasoff*, 223 F.3d at 904-05.

11. All the circuits but the Third, Fifth, and Eleventh routinely publish their "unpublished" opinions through Lexis and Westlaw. See Robel, *supra* note 9, at 401 n.9; see also Hannon, *supra* note 1, at 210-13. Professor Hannon did find sixty-three unpublished text opinions from the Third, Fifth, and Eleventh Circuits in Westlaw's database. Given that Prof. Hannon found over 100,000 unpublished dispositions without textual opinion from the three circuits in Westlaw, the sixty-three cases can only be viewed as aberrations. See *id.* at 211 & n.59.

12. Robel, *supra* note 9, at 404-09.

non-citability rule in the recent case of *Hart v. Massanari*.¹³ As a result, while I agree that the no-citation rules currently in place ought to be reconsidered, I differ as to the form that the reconsideration should take.

In Part I of this essay, I briefly consider the historical arguments for and against the appellate courts' power to issue non-precedential opinions, focusing on Judge Arnold's now-vacated opinion in *Anastasoff* and Judge Kozinski's opinion in *Hart*. I conclude that, while Judge Arnold goes too far in arguing that current non-citation rules violate Article III's conception of the "judicial power," Judge Kozinski's argument that the courts of appeals are entirely free to designate some of their opinions as non-precedential equally seems to push the boundaries of judicial propriety, if not of constitutional principle. In Part II, I consider Dean Robel's argument that the no-citation rules in the federal and state courts of appeals should be abolished. While I agree with Dean Robel's contention that unpublished opinions should be freely citable, I take issue with her implicit assertion, following the spirit if not the letter of *Anastasoff*, that these opinions should be treated as binding precedent. Finally, in Part III I note that, while the limits on availability and citability of unpublished opinions in the federal courts stand as obstacles to a productive and proper use of unpublished opinions, the rules in the state courts present even greater problems. I end by suggesting that state governments should rethink the rules that limit the availability and citability of unpublished opinions emanating from the state intermediate courts of appeals.

I. THE POWER TO DEFINE PRECEDENT

Judge Arnold's conclusion in *Anastasoff*¹⁴ that treating unpublished opinions as non-precedential was unconstitutional relied principally on an originalist interpretation of the "judicial power" identified, but not defined, by Article III.¹⁵ Because the debates in Philadelphia were silent on the role of precedent in defining the judicial power, and because the *Federalist* papers referred to the question only obliquely,¹⁶ Judge Arnold was forced to look to other sources on

13. 266 F.3d 1155, 1180 (9th Cir. 2001).

14. *Anastasoff*, 223 F.3d at 905.

15. Section 1 of Article III identifies the courts in which "[t]he judicial power of the United States, shall be vested," and Section 2 describes the categories of cases to which "[t]he judicial power shall extend." U.S. CONST. art. III, §§ 1, 2. Neither section offers any further description or definition of the judicial power, nor does any other article or amendment to the Constitution.

16. In THE FEDERALIST No. 78, Alexander Hamilton wrote of judges: "To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them." THE FEDERALIST No. 78, at 527 (Alexander Hamilton) (Van Doren ed. 1979). This passage, however, is not part of any detailed description of the nature of judicial power; instead, it forms part of Hamilton's argument in favor of life tenure for judges. The need to master a large body of precedent, Hamilton argued, required substantial ability, education, and experience, which few would possess, and even fewer would simultaneously have sufficient integrity. Life tenure,

the nature of judging that the founding generation regarded with respect, including the writings of Sir Edward Coke and the *Commentaries* of Sir William Blackstone.¹⁷ These authorities, Judge Arnold concluded, held that respect for prior court decisions was an essential component of the judicial function, providing the only real bulwark against the exercise of unbridled, and potentially tyrannical, discretion.¹⁸ From this, Judge Arnold concluded that the framers of the Constitution understood the constitutional act of judging to require observance of a fairly rigid rule of horizontal *stare decisis*, in which, once a question of law was decided, subsequent members of the same court would be bound by that decision.¹⁹

Judge Arnold's originalist argument has been challenged by scholars, who contend that the strict adherence to precedent inherent in Judge Arnold's conception of *stare decisis* was a creature of the Nineteenth Century, not the Eighteenth, and that the founding generation had a less developed sense of the meaning of precedent than Judge Arnold suggested.²⁰ Moreover, scholars argue that even the authorities cited by Judge Arnold, including Coke and Blackstone, viewed prior decisions as having at most persuasive effect—a prior decision was evidence of what the law was, but if subsequent judges believed that the prior case was wrongly decided, they were not compelled to follow it.²¹ Judge Kozinski's opinion in *Hart* further undermines *Anastasoff*'s historical rationale, arguing that the organization of the courts in both England and the United States and the methods of reporting court decisions remained inchoate until some time after the adoption of the Constitution.²²

Ultimately the principal difficulty with Judge Arnold's historical analysis is that he relied on it too heavily. Judge Arnold concedes toward the end of the *Anastasoff* opinion that Article III does not require rigid adherence to *stare decisis*.²³ He instead reads Article III as creating, in effect, a burden of

according to Hamilton, is necessary to persuade those few with the necessary qualifications to give up potentially lucrative private practices. *See id.* In light of this context, Hamilton's comment cannot reasonably be taken as a firm statement that the Constitution requires a strong *stare decisis* rule.

17. *Anastasoff*, 223 F.3d at 900-03.

18. *Id.* at 900.

19. *See id.* at 903.

20. *See* R. Ben Brown, *Judging in the Days of the Early Republic: A Critique of Judge Richard Arnold's Use of History in Anastasoff v. United States*, 3 J. APP. PRAC. & PROCESS 355, 356-60 (2001); Jeffrey O. Cooper & Douglas A. Berman, *Passive Virtues and Casual Vices in the Federal Courts of Appeals*, 66 BROOK. L. REV. 685, 749-51 (2001); *Recent Cases: Constitutional Law—Article III Judicial Power—Eighth Circuit Holds That Unpublished Opinions Must Be Accorded Precedential Effect*, 114 HARV. L. REV. 940, 943 (2001) [hereinafter *Recent Cases: Constitutional Law*].

21. *See* Brown, *supra* note 20, at 356-60; Cooper & Berman, *supra* note 20, at 749-51; *Recent Cases: Constitutional Law*, *supra* note 20, at 943.

22. *See* *Hart v. Massanari*, 266 F. 3d 1155, 1168-69 (9th Cir. 2001).

23. *Anastasoff*, 223 F.3d at 904-05.

justification: where a court has previously decided an issue, a judge of the same court must either follow the prior decision or present a reasoned explanation why the prior case should not be followed.²⁴ Yet Judge Arnold relies on this reading, in effect, to constitutionalize the federal appellate courts' practice of treating a panel decision as binding on subsequent panels in the absence of an *en banc* review or other circuit-wide decision to abandon the prior holding.²⁵ Nothing in Article III requires such a rule of horizontal *stare decisis*, and Judge Arnold's historical sources do not compel it; the federal district courts, for example, have long operated on the principle that one district judge is not bound by the prior decisions of another, even within the same judicial district, without any suggestion that in doing so they were operating outside the bounds of the constitutional "judicial power."²⁶ Indeed, the Eighth Circuit's citation rule for unpublished opinions arguably is consistent with Article III as Judge Arnold seems to read the constitutional text: the rule does generally discourage citation of unpublished opinions, but permits a litigant to "cite an unpublished opinion of this court if the opinion has persuasive value on a material issue and no published opinion of this or another court would serve as well."²⁷ In a situation such as that in *Anastasoff*, where a prior panel resolved a novel legal question in an unpublished opinion that a party subsequently cites in a new and different case, the new panel perhaps should not feel free to disregard the prior decision entirely, as if the prior dispute had never occurred and the past parties had never been bound by the prior panel's determination. But neither, at least in a constitutional sense, must the new panel be bound by the actions of the old. In other words, the new panel properly could have explained the reason for its disagreement and arrived at a contrary conclusion than the prior panel.

If Judge Arnold seems to demand too much of his historical sources to support his conclusion that no-citation and limited-citation rules are unconstitutional, Judge Kozinski arguably demands too much of his own sources to support his argument that no-citation rules face no constitutional obstacle. In countering Judge Arnold's suggestion that at common law all prior decisions were regarded as authority, albeit persuasive, not binding, authority, Judge Kozinski notes that the reporters of judicial opinions in the Eighteenth Century frequently either omitted or reinterpreted cases that they believed to be wrongly decided.²⁸ One can easily distinguish, however, between a third party—a reporter, a commentator, or even a judge of a different court—concluding that a case was wrongly decided and ought not to be followed (or even be considered in a discussion of what the law is) and the issuing judge herself deciding that her opinion, while binding on the parties to the dispute before the judge, ought not to be followed or even considered in subsequent cases. In the former situation,

24. *Id.*

25. *See id.*

26. *See* Salem M. Katsh & Alex V. Chachkes, *Constitutionality of "No-Citation" Rules*, 3 J. APP. PRAC. & PROCESS 287, 288 n.5 (2001).

27. 8TH CIR. R. 28A(i).

28. *See Hart v. Massanari*, 266 F.3d 1155, 1165 (9th Cir. 2001).

the judgment that a case is not good law and ought not to be followed represents a form of collective decision, for even if one reporter, one commentator, or one court concludes that the case ought to be excluded from subsequent discussions of the state of the law, others might reach a different conclusion and reintroduce the case into the body of precedents on which courts rely. In the latter situation, as in the Ninth Circuit rule that Judge Kozinski upholds, the issuing court itself, with no involvement from others, makes the determination *ex ante* about what probative force its decision will have in the future.²⁹

Adopting Judge Kozinski's approach may not necessarily be a non-judicial act in a constitutional sense, but there is nevertheless reason to question its propriety. One of the foundations of the American legal system, inherent in both common and statutory law, is the basic notion that like cases will be treated alike. This principle, embodied in the Equal Protection Clause of the Fourteenth Amendment,³⁰ is seriously threatened when a court has the option of treating a litigant in one case according to one interpretation of the law which the court then declares to be non-precedential and uncitable, and then treats a subsequent litigant in an identical factual setting according to a different interpretation of the law without any explanation of why the result should be different.

The ability to dictate whether or not a particular decision will have any precedential effect opens the door to the appearance (at the very least) of arbitrary decisionmaking: it raises the possibility that a court will decide a particular case for reasons unrelated to legal merit, avoiding any negative future ramifications of its decision by declaring that the case may not be cited in subsequent litigation.³¹ Such a result surely would have seemed strange to members of the founding generation, who were famously suspicious of the arbitrary exercise of power, in whichever branch of government it might occur.

Judge Kozinski's argument would be less troubling if the courts of appeals confined their unpublished, non-precedential opinions to appeals that involved purely factual questions, reviews of discretionary district court decisions, or application of well-established legal rules to familiar factual settings. Yet, whatever the initial drafters of the non-citation rules may have intended, we know from a quarter-century of experience that the courts of appeals do not, in fact, confine their unpublished opinions to such cases. *Anastasoff* itself involved a dispute over the propriety of relying upon a prior Eighth Circuit case that decided a legal question of first impression,³² and it is but one of many such cases.³³

29. See *id.* at 1179.

30. U.S. CONST. amend. XIV, § 1.

31. See Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS 219, 223 (1999).

32. *Anastasoff v. United States*, 223 F.3d 898, 899 (8th Cir.), *vacated as moot en banc*, 235 F.3d 1054 (8th Cir. 2000).

33. In the most prominent post-*Anastasoff* example, a panel of the Fifth Circuit chose to ignore an unpublished opinion that had originally resolved a legal question and to reach a contrary conclusion by way of a published opinion. See *Williams v. Dallas Area Rapid Transit*, 256 F.3d

Judge Arnold's position in *Anastasoff* and Judge Kozinski's stance in *Hart* represent opposite poles with respect to the treatment of unpublished opinions: Judge Arnold would insist that unpublished opinions be accorded the same precedential weight as those that appear in the official reports, while Judge Kozinski would permit the courts to render decisions without any precedential effect whatsoever. Neither approach seems fully justified by the historical record on which each judge relies—a historical record that, as Judge Kozinski himself notes,³⁴ reflects judicial structures and methods of case reporting very different from those in place today. Thus, it would seem that determination of the proper role of unpublished opinions in the modern courts of appeals requires consideration of sources above and beyond history.

II. CASELAW AND THE ROLE OF INTERMEDIATE APPELLATE COURTS

Dean Robel abjures the constitutional and historical arguments that occupy Judge Arnold and Judge Kozinski in the *Anastasoff* and *Hart* decisions. Instead, she focuses on the cultural norms that have grown up around the use of judicial opinions. Dean Robel's innovation is to focus not on the value ascribed to unpublished opinions by those courts that issue them, but rather on the role that opinions of a court, both published and unpublished, play in the interpretive community into which those opinions are released.³⁵ Dean Robel notes that the most common consumers of appellate opinions—attorneys who practice before the court, trial court judges who are bound to follow published appellate decisions by rules of vertical *stare decisis*, and even many appellate judges of the courts that have declared unpublished opinions non-precedential—do commonly read at least a substantial portion of the unpublished opinions that the appellate courts render.³⁶ As unpublished opinions tend, as a general matter, to be uninspiring exercises in prose,³⁷ Dean Robel quite reasonably surmises that the consumers of these opinions must derive some other value from them.³⁸ Unpublished opinions, she suggests, are regarded, at least by attorneys and trial court judges, as having at least some predictive value, indicating generally the direction in which the appellate court is heading if not firmly defining the destination that the court will reach.³⁹ In other words, the opinions are regarded as having meaning by their readers, even if the judges who authored the opinions would deny them any meaning. The opinions belong, not solely to their authors, but to the legal community generally. Because the legal community generally regards them as having precedential value, at least in a loose sense, the appellate

260, 260-61 (5th Cir. 2001) (Smith, J., dissenting from denial of rehearing en banc).

34. See *Hart*, 266 F.3d at 1175.

35. Robel, *supra* note 9, at 404-09.

36. *Id.*

37. One of the most commonly-voiced rationales for unpublished opinions is that they free judges of the burden of producing polished, thoroughly-reasoned text.

38. Robel, *supra* note 9, at 404-09.

39. *Id.*

courts should recognize prior unpublished decisions and accord them precedential weight.⁴⁰ For this reason, Dean Robel argues the rules that treat unpublished opinions as non-precedential should be abandoned.⁴¹

Dean Robel's argument that rules barring citation of unpublished opinions should be abandoned is persuasive; yet it is incomplete. It appears that Dean Robel believes not only that unpublished opinions should be fully citable, but that they should constitute binding authority on the courts that rendered them, as are published opinions.⁴² This conclusion, I believe, fails to give appropriate weight to one of the central difficulties created by the unique institutional role of the courts of appeals.⁴³ The courts of appeals serve dual functions: they correct errors committed in trial-level courts and they enunciate principles of law to be applied in subsequent cases.⁴⁴ In their lawmaking function, the courts of appeals are of course subordinate to the Supreme Court, which has the ultimate say on issues of legal interpretation.⁴⁵ Yet, because the Supreme Court decides only a limited number of cases of its own choosing, inevitably a substantial portion of the legal precedent applicable in any one jurisdiction is the product of the jurisdiction's court of appeals rather than the Supreme Court.⁴⁶ The development of this body of precedent is complicated by the fact that the courts of appeals are courts of mandatory jurisdiction; they do not choose the timing or the manner in which legal issues are presented to them.⁴⁷ The courts of appeals, moreover, follow a policy in which an initial panel decision resolving a particular legal question is binding on subsequent panels. This policy, when placed in conjunction with the appellate courts' mandatory jurisdiction, means that frequently the first panel to confront a legal issue will do so in less than ideal circumstances—in a case, for example, in which the lawyers frame and argue the

40. *Id.* at 416.

41. *Id.* at 417.

42. I draw my conclusion that Dean Robel believes unpublished opinions should be binding authority from her rejection of my suggestion, voiced elsewhere, that unpublished opinions could serve a productive purpose, and could in fact improve the court's exercise of its lawmaking function if they were treated as persuasive but not binding authority. See Cooper & Berman, *supra* note 20, at 738-43. If I have misunderstood or mischaracterized Dean Robel's argument, I apologize.

43. The arguments sketched here are presented in considerably more detail in Cooper & Berman, *supra* note 20, at 712-24, 738-47.

44. See *id.* at 712.

45. For simplicity's sake, this paragraph will describe the relationship of the federal courts of appeals to the United States Supreme Court. The same principles apply, however, in any state that has an intermediate court of appeals and a supreme court with limited, discretionary jurisdiction.

46. See Cooper & Berman, *supra* note 20, at 718.

47. 28 U.S.C. § 1291 (1994). The court's mandatory jurisdiction does not extend to most categories of interlocutory appeals, 28 U.S.C. § 1292(b), but such appeals represent a relatively minuscule portion of the appellate courts' work. See Michael E. Solimine, *Revitalizing Interlocutory Appeals in the Federal Courts*, 58 GEO. WASH. L. REV. 1165, 1176, 1198-99 (1990).

legal issue poorly.⁴⁸ In these circumstances, if all decisions of the appellate courts are binding precedent, the courts' ability to develop precedent in a coherent manner is significantly impaired by the dictates of the courts' mandatory jurisdiction.⁴⁹

The need to maintain a rational body of precedent in a court whose lawmaking function is driven by its error-correcting function is part of what motivates Judge Kozinski's argument in favor of non-precedential unpublished opinions.⁵⁰ Yet the desired result could be achieved, without the danger of wholly arbitrary decisionmaking that Judge Kozinski's solution presents, if unpublished opinions were treated as persuasive but not binding authority. Such a use of unpublished opinions would allow an early panel presented with a novel legal issue in a less than ideal setting to decide the case before it, as the court's mandatory jurisdiction would require, while avoiding a definitive resolution of the legal issue.⁵¹ This approach would also avoid much of the seeming unfairness of non-precedential opinions, by effectively creating a burden of explanation on panels that would depart from the rationale of cases previously decided by unpublished opinions. Finally, the use of unpublished opinions as persuasive but non-binding precedent would accord with the meaning that, as Dean Robel argues, the interpretive communities of lawyers and lower-court judges already ascribe to them.⁵²

III. NO-CITATION RULES IN THE STATE INTERMEDIATE APPELLATE COURTS

Of course, unpublished opinions can only play the role I suggest for them if litigants have access to them and may cite them in submissions to the courts. Current rules in the federal courts obstruct the use of unpublished opinions as persuasive authority. In six circuits, unpublished opinions may be cited only in the same or related cases, for the purpose of establishing issue preclusion, claim preclusion, or law of the case.⁵³ Conversely, in six other circuits, unpublished opinions are not binding but may be cited as persuasive authority.⁵⁴ Although

48. See *Hart v. Massanari*, 266 F.3d 1155, 1175 (9th Cir. 2001).

49. See *Cooper & Berman*, *supra* note 20, at 722-23.

50. See *Hart*, 266 F.3d at 1175, 1179.

51. See *Cooper & Berman*, *supra* note 20, at 741-42.

52. See *Robel*, *supra* note 9, at 404-09.

53. See D.C. CIR. R. 28(h) (prohibiting citation to unpublished opinions for purposes other than preclusion); 1ST CIR. R. 36(b)(2)(f) (allowing citation of unpublished opinions only in related cases); 2D CIR. R. § 0.23 (same); 7TH CIR. R. 53(b)(2)(iv) (prohibiting citation to unpublished orders except for purposes of claim preclusion, issue preclusion, or law of the case); 9TH CIR. R. 36-3(a) (same); FED. CIR. R. 47.6(b) (prohibiting citation of unpublished opinion as precedent).

54. See 4TH CIR. R. 36(c) (citation to unpublished opinions is disfavored but is permissible where counsel believes that no published opinion would serve as well); 5TH CIR. R. 47.5.4 (stating that an unpublished opinion is not precedent but may be persuasive); 6TH CIR. R. 28(g) (citation to unpublished opinions is disfavored but is permissible where counsel believes that no published

some of these circuits also state that citation to unpublished opinions is disfavored, courts in these circuits can nonetheless act in a manner consistent with the interpretive community's expectations about precedent without simultaneously surrendering control over their lawmaking authority to the vicissitudes of the appellate docket.⁵⁵ There has, in addition, been movement in the direction of greater citability since the courts first adopted publication and non-citation rules in the mid-1970s.⁵⁶ Particularly in light of the renewed interest in unpublished opinions among lawyers, judges, and commentators as a result of *Anastasoff*, the federal courts may be headed in a direction that treats unpublished opinions seriously, as persuasive if not binding authority.

The rules of the state intermediate appellate courts, in contrast, reveal no such trend. Forty states now have intermediate appellate courts;⁵⁷ of these, thirty-seven have rules that permit appeals to be resolved by way of unpublished opinion.⁵⁸ The rules governing the availability and citability of these opinions generally lag behind those in place in the federal courts. Whereas the

opinion would serve as well); 8TH CIR. R. 28A(i) (although "parties generally should not cite" unpublished opinions, citation is permitted where the unpublished opinion is persuasive and no other opinion would serve as well); 10TH CIR. R. 36.3.5 (citation of an unpublished opinion is disfavored but is permissible if it is persuasive, no published opinion has addressed the issue, and citation would assist the court); 11TH CIR. R. 36-2, 36-3 (unpublished opinion is not binding precedent but may be persuasive, although the court does not favor citation to unpublished opinions). The Third Circuit is something of a wildcard. Its local rules are silent on the citability of unpublished opinions. The court's Internal Operating Procedures state that the court itself will not cite unpublished opinions but are silent as to whether counsel may cite such opinions in their submissions to the court. *See* 3RD CIR. INT. OP. PROC. 5.8. In practice, it appears that counsel do occasionally refer to unpublished opinions in their briefs.

55. *See supra* note 54 and accompanying text.

56. *Compare* 6TH CIR. R. 28(g) (citation to unpublished opinions is disfavored but is permissible where counsel believes that no published opinion would serve as well); 8TH CIR. R. 28A(k) (although "parties generally should not cite" unpublished opinions, citation is permitted where the unpublished opinion is persuasive and no other opinion would serve as well), *with* Reynolds & Richman, *supra* note 5, at 1180 & n.75 (describing rules in place in these circuits in 1978, which prohibited citation to unpublished opinions). The Fifth Circuit has more recently adopted a rule allowing unpublished opinions to be cited as persuasive authority. *See* Melissa M. Serfass & Jessie L. Cranford, *Federal and State Court Rules Governing Publication and Citation of Opinions*, 3 J. APP. PRAC. & PROCESS 251, 254 (2001).

57. Delaware, Maine, Montana, Nevada, New Hampshire, Rhode Island, South Dakota, Vermont, West Virginia, Wyoming, and the District of Columbia currently lack intermediate courts of appeals. *See* Serfass & Cranford, *supra* note 56, at 252 n.5.

58. All opinions of the Connecticut and Mississippi appellate courts are published. Mississippi does permit its court of appeals to resolve cases by *per curiam* affirmance without formal opinion. *See* MISS. R. APP. P. 35-A(c), 35-B(d); *see also* Serfass & Cranford, *supra* note 56, at 269. New York appears to have a similar practice: while New York's rule requires publication of every opinion submitted, the official reports include tables of appellate resolutions without published opinion.

unpublished opinions of all but three federal circuits are available on Lexis and Westlaw,⁵⁹ only ten states make their appellate courts' unpublished opinions, civil and criminal, available on Westlaw.⁶⁰ Alabama makes available the concurring and/or dissenting opinions that accompany unpublished dispositions, but does not make available the majority opinion. Conversely, Indiana and Pennsylvania make available the dispositions of their cases decided by unpublished opinion, but do not release the opinions to Westlaw. Finally, twenty states do not make any information concerning cases decided by unpublished opinion available on Westlaw.⁶¹ As a general matter, then, it is fair to say that state appellate unpublished opinions are less accessible than federal appellate unpublished opinions.

Not only are state appellate unpublished opinions less readily available than their counterparts in the federal courts, they are also less readily citable. Only five states expressly permit the citation of unpublished appellate opinions as persuasive authority.⁶² In contrast, thirty-two states bar citation to unpublished opinions.⁶³ In these states, unpublished opinions may have utility—that is, they may assist the courts in managing expanding caseloads—but the courts in these states open themselves fully to the charges of unfairness and lack of accountability that have traditionally been leveled against the use of unpublished

59. See *supra* note 11.

60. The states are Alaska, Arizona, Massachusetts, Michigan, Minnesota, North Dakota, Ohio, Tennessee, Texas, Utah, and Virginia. I used the calendar year 2000 as the relevant period and obtained this list of states by performing the following “terms and connectors” search in each state’s caselaw database in Westlaw: (unpublished (not /4 publication)) & da(2000). Only a limited number of civil cases from the Tennessee Court of Appeals were found with this search, but a further search of references to Tennessee Court of Appeals Rules 11 and 12 (the court’s publication rules) revealed a great number on Westlaw, as are the unpublished opinions of the Tennessee Special Workers’ Compensation Appeal Panel.

61. The states are Arizona, California, Colorado, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maryland, Missouri, New Jersey, New Mexico, North Carolina, Oklahoma, Oregon, and South Carolina. In ten of these states—Hawaii, Idaho, Illinois, Iowa, Louisiana, Maryland, Mississippi, Missouri, Oklahoma, and South Carolina—Westlaw includes opinions that have not yet become final and that are subject to withdrawal or modification. These opinions are not unpublished opinions, strictly speaking: they are intended for publication and thus are intended to be accorded full precedential status once they have been finalized.

62. The states are Delaware, Michigan, Minnesota, North Dakota, and Ohio. See Serfass & Cranford, *supra* note 56, at 261-75. Tennessee also permits citation of an unpublished opinions as persuasive authority, unless the opinion is expressly designated “not for citation.” See *id.* at 281. Of these, all but Delaware make their unpublished opinions available on Westlaw. See *supra* note 60.

63. The states are Alabama, Alaska, Arizona, Arkansas, California, Colorado, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Missouri, Nebraska, New Jersey, New Mexico, North Carolina, Oklahoma, Oregon, Pennsylvania, South Carolina, Texas, Utah, Virginia, Washington, and Wisconsin. See Serfass & Cranford, *supra* note 56, at 258-75.

opinions.⁶⁴ State appellate courts therefore may wish to rethink their rules regarding the use of unpublished opinions. Much of the time-saving that serves as the principal justification for unpublished opinions would remain were unpublished opinions treated as persuasive, not binding, authority, while the courts would free themselves of the specter of arbitrary, unaccountable decision-making that inevitably accompanies the use of unpublished, uncitable opinions.

64. See William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 282-83 (1996).

THINKING ABOUT THE SUPREME COURT AFTER *BUSH V. GORE*

LINDA GREENHOUSE*

I stand before you still recovering from that amazing three-week period in late November and early December when the Supreme Court decided the two cases from the 2000 presidential election.¹ Let me give you a bit of the flavor of those thirteen hours on Tuesday, December 12, 2000, when the political future of the country hung in the balance and all we knew that at any moment the Court would issue a decision on *Bush v. Gore*.²

People were afraid to leave the room even for a minute. The press room was about the size of a subway car, and as the day went on and reporters kept arriving from all over the world, it became like the most crowded rush hour subway car ever. We received no guidance from the Court staff as to when a decision might come. The breathless waiting, interrupted only by calls from increasingly worried editors as deadlines approached, took on a vaguely hallucinogenic quality. People took to interpreting the arrangement of plants on the desk of a pressroom assistant as some kind of code. I did not think it was, but who was to say? As night fell and starvation loomed, a few erstwhile competitors formed a collective and sent out for pizza. Those who had not gotten in on the deal at the beginning were eventually reduced to begging for pieces of crust.

Unusual times call for unusual responses. I sat down to write my typical speech about the Court for this symposium, but could not go through with it. What is my claim to expertise, after all? The Court completely surprised me by taking up the election case in the first place, by granting the stay that stopped the recount, and by its willingness to put itself in a position of extreme vulnerability. After more than twenty-two years of covering the Court, I felt completely at sea. So I have decided to do something different—to start out by stepping out of my usual role and inviting you to join me in a little role-playing with the following scenario:

I stand before you now, not as the *New York Times* Supreme Court correspondent, but as Chief Justice William Rehnquist—minus the four gold stripes, which I had to leave behind at airport security.

You may have read my year-end report on the federal judiciary that the Court issued this past New Year's Day.³ In that report, I of course took note of the election cases. "This Presidential election, however, tested our Constitutional system in ways it has never been tested before. The Florida State courts, the lower federal courts and the Supreme Court of the United States became involved in a way that one hopes will

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1. See *Bush v. Gore*, 531 U.S. 98 (2000); *Bush v. Gore*, 531 U.S. 1046 (2000).

2. 531 U.S. 98.

3. Chief Justice William Rehnquist, U.S. Supreme Court, *2000 Year-End Report on the Federal Judiciary* (2001), at <http://www.supremecourtus.gov/publicinfo/year-end/2000year-end-report.html>.

seldom, if ever, be necessary in the future.”⁴

That was all I said—two sentences out of a nineteen-page report. Is that all there was to say? Of course not. Thank you for inviting me to Indianapolis tonight to share some further thoughts. I’m not going to go over the tangled chronology of that amazing three-week period when the Court accepted and decided the two appeals from the Florida Supreme Court.⁵ I’ve always said our decisions speak for themselves. They may not speak very clearly, but as Justice Robert Jackson said, “We are not final because we are infallible, but we are infallible only because we are final.”⁶ You know, I clerked for Justice Jackson, and I can tell you he had a real way with words.

For the chronology, you can read an interminable article by Linda Greenhouse that appeared in the February 20, 2001 edition of the *New York Times*.⁷ Now, I don’t know her sources. I wouldn’t give her an interview, of course, and I can’t really comment on the article except to say that I do agree with her conclusion—or, I should say, with her statement of the obvious—that the per curiam’s equal protection holding in *Bush v. Gore*⁸ was not the opening shot in any Rehnquist Court equal protection revolution. Those civil rights lawyers who think that it was are just trying to make lemonade out of the lemon we handed them when we called the election for George W. Bush. Anyone who tries to cite *Bush v. Gore*⁹ will quickly find out that it was a ticket for one train only.

I want to put one thing on the table right now—the charge of hypocrisy that has been leveled against those of us in the majority. It’s true that the five of us—the Federalism Five, some people call us—have been busy rediscovering state sovereignty, rescuing the Tenth and Eleventh Amendments from obscurity. Some people seemed to think that all of that meant we were bound for the sake of consistency to defer to the Florida Supreme Court’s interpretation of Florida law. This is wrong. I understand why that kind of criticism concerning the majority might have a kind of surface appeal, but that’s what it reflects—a superficial understanding of what we are about.

People who think that what has motivated the Rehnquist Court in such cases as *United States v. Lopez*,¹⁰ *City of Boerne v. Flores*,¹¹ *Florida Prepaid Postsecondary Education Expense Board v. College*

4. *Id.*

5. See *Bush*, 531 U.S. 98; *Bush*, 531 U.S. 1046.

6. *Brown v. Allen*, 344 U.S. 443, 540 (1953).

7. Linda Greenhouse, *Bush v. Gore: A Special Report; Election Case a Test and a Trauma for Justices*, N.Y. TIMES, Feb. 20, 2001, at A1.

8. 531 U.S. 98, 109-10 (2000).

9. *Id.*

10. 514 U.S. 549 (1995).

11. 521 U.S. 507 (1997).

Savings Bank,¹² *Alden v. Maine*,¹³ *Kimel v. Florida Board of Regents*,¹⁴ and just last month, *Board of Trustees of the University of Alabama v. Garrett*¹⁵ is states' rights are looking through the wrong end of the constitutional telescope. The game that is really afoot is judicial supremacy, and for that, states' rights are just the most convenient playing field. After all, if we are really so interested in states' rights, why do we continually strike down the North Carolina legislature's judgment on how to draw the state's congressional districts? What could be closer to the core of a state's sovereignty interests than the choices its legislature makes about how to allocate power within its borders? What this is really about is protecting the Supreme Court's authority to have the last word.

John Marshall said it best. In *United States v. Morrison*, my opinion for the Court which struck down the civil damages provision of the Violence Against Women Act, I quoted from *Marbury v. Madison*: "It is emphatically the province and duty of the judicial department to say what the law is."¹⁶

Just last June, in an opinion that surprised many supposedly well-informed court-watchers, I wrote for the Court in *Dickerson v. United States*¹⁷ that Congress's clumsy effort to legislatively overrule *Miranda v. Arizona*¹⁸ was unconstitutional.¹⁹ As everyone knows, I have never liked *Miranda*, and I don't like it to this day. But if there is one thing I like even less than undue solicitude for the rights of criminal defendants, it's Congress telling us how to interpret the Constitution. In my *Dickerson* opinion, I quoted Justice Kennedy's opinion for the majority in *City of Boerne v. Flores*,²⁰ the 1997 case that overturned the contumaciously-named Religious Freedom Restoration Act,²¹ which itself purported to overrule our 1990 interpretation of the Free Exercise Clause in *Employment Division v. Smith*.²² Coincidentally Justice Kennedy quoted John Marshall in *Marbury v. Madison*²³ in his *City of Boerne* opinion.²⁴

I have made it perfectly clear, both in my recently reissued book on

12. 527 U.S. 627 (1999).

13. 527 U.S. 706 (1999).

14. 528 U.S. 62 (2000).

15. 531 U.S. 356 (2001).

16. 529 U.S. 598, 616 n.7 (2000) (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803)).

17. 530 U.S. 428 (2000).

18. 384 U.S. 436 (1966).

19. *Dickerson*, 530 U.S. at 444.

20. 521 U.S. 507 (1997).

21. 42 U.S.C. § 2000bb (1994).

22. 494 U.S. 872 (1990).

23. 5 U.S. 137 (1803).

24. 521 U.S. 507, 516, 529 (1997).

Supreme Court history²⁵ and in remarks from the bench last month, that John Marshall is my judicial hero. Last month, I opened the Court's daily session by departing from my normal routine and commemorating the 200th anniversary of Chief Justice Marshall's swearing in. I proposed that John Marshall be elevated to the status of founding father, along with Washington, Hamilton and Jefferson: "I do not think I am overstating the case to say that it is in large part because of Chief Justice Marshall's tenure on the Supreme Court that the Third Branch of our government occupies the co-equal position it does today." That may have been undershooting the mark a little bit, but you never know who might show up at the Court's public sessions. So, just between us, I have no intention of settling for co-equal. In my view, the Supreme Court is not co-anything. If the election case proved anything, I trust it proved that.

I probably should also mention that Chief Justice Marshall served on the Supreme Court for thirty-four years. I am now closing in on my thirtieth anniversary. Doesn't time fly? I know there's a lot of speculation out there that I might be handing President Bush my retirement sometime soon. But what's the hurry when I have a record to break and so much work still to do?

I hope I have not stretched your indulgence beyond the breaking point. To err on the side of caution, I will reassume my normal role and spend our remaining minutes together by sharing a few thoughts about where the Court is right now and how to think about it as we move on from the election case in what I think of as a multi-step recovery process.

There is a Rehnquist Court revolution in progress, and it is definitely not an equal protection revolution. Nor is it a states' rights revolution, as I had often thought and written in the six years since the Court in *United States v. Lopez*²⁶ struck down an exercise of Congress' commerce power for the first time in sixty years. Rather, it is a separation of powers revolution that has to do with the primacy of the judicial branch and of the Court itself. The Court's 5-4 ruling in *Garrett*,²⁷ holding that the Americans with Disabilities Act (ADA)²⁸ was not an appropriate exercise of Congress' authority to enforce the Fourteenth Amendment, and that the law, at least in its employment title, failed to abrogate the states' Eleventh amendment immunity from suit. This was a breathtaking judicial trumping of Congress' policy judgment. To understand how radical a shift there has been, take yourself back to 1990, when the ADA, sponsored by Senator Bob Dole, signed by President George Bush, and containing an explicit abrogation of Eleventh Amendment immunity, became law. It was inconceivable

25. WILLIAM H. REHNQUIST, *THE SUPREME COURT* (Alfred A. Knopf 2001).

26. 514 U.S. 549 (1995).

27. 531 U.S. 356 (2001).

28. Americans with Disabilities Act of 1990, Pub. L. No. 107-56, 104 Stat. 327 (codified and amended in scattered sections of 42 U.S.C.).

that the abrogation would be held invalid by the Supreme Court. Yet by the time the ruling in *Garrett* came down, such an outcome appeared plausible if not completely predictable.

Where do we go from here? That depends on many variables, including the timing of any retirements and the politics of filling the vacancies. That is beyond our collective power to predict. One thing of which I am certain is that we need to maintain an active and informed civic dialogue about the Court. Everyone has done their screaming and venting or possibly, cheering, about *Bush v. Gore*,²⁹ but there are seventy-five other cases for decision this Term, many of them quite important, and it is important that they receive full attention.

I thought I might spend a few minutes putting the election case aside, if that is possible. I obviously cannot analyze the entire docket. What might be more helpful is for me to offer a generic road map, a template for observing the Court and assessing its work regardless of the particular doctrinal area involved and one's view of the merits of a particular decision. I think, that as citizens, we are entitled to hold the Court to a set of performance standards, and I will sketch these out briefly and offer some examples from the past few Terms of what I am talking about.

At the most basic level, the Court owes the public an obligation to speak clearly. Obviously, there will be specialized language in any legal opinion, but an educated person ought to be able to pick up a Supreme Court opinion, make sense of the reasoning, find a clear bottom line, and count the vote, without making a two-color chart. I had to do that a few years back when confronted with the following headnote in *Denver Area Educational Telecommunications Consortium v. FCC*,³⁰ which had to do with the regulation of indecent programming on cable television.

[Justice] Breyer announced the judgment of the Court and delivered the opinion of the Court with respect to Part III, in which [Justices] Stevens, O'Connor, Kennedy, Souter, and Ginsburg joined; an opinion with respect to Parts I, II, and V, in which [Justices] Stevens, O'Connor and Souter joined, and an opinion with respect to Parts IV and VI, in which [Justices] Stevens and Souter joined. [Justices] Stevens and Souter filed concurring opinions. [Justice] O'Connor filed an opinion concurring in part and dissenting in part, [Justice] Kennedy filed an opinion concurring in part, concurring in the judgment in part, and dissenting in part, in which [Justice] Ginsburg joined, [Justice] Thomas filed an opinion concurring in the judgment in part and dissenting in part, in which [Chief Justice] Rehnquist and [Justice] Scalia joined.³¹

As consumers of the Court's work, it seems to me we have a right to expect opinions that we can understand, at least structurally. After all, the power of judicial review is an extraordinary power—one of America's major gifts to

29. 531 U.S. 98 (2000).

30. 518 U.S. 727 (1996).

31. *Id.* at 731 (internal citations omitted).

democracy and political theory. That great power gives the Court what Professor Burke Marshall of Yale Law School has called the "preeminent duty of principled explanation of what is actually going on in constitutional decision-making,"³² or what Professor Joseph Goldstein described as "the Supreme Court's obligation to maintain the Constitution as something we the people can understand."³³

That raises another question: Who is the Court's audience, after all? Yes, it is, in Professor Goldstein's words, "we the people," but I think that is a bit romantic and not too realistic. Judges of other courts in the federal and state systems are an important audience, of course, and I know, from my conversations with judges over the years, that they are as frustrated as anyone else when the Supreme Court fails to attain a basic level of coherence.

However, I want to focus on the wider audience for the Court's work. The public learns about Supreme Court opinions only derivatively, through the media, or as mediated by politicians or leaders of other sectors of society. How many people believe that the Court's school prayer decisions of the 1960s expelled God from the classroom, because that is what sloppy journalism and political demagoguery told them the Court did? Does the distinction matter? It absolutely does.

In evaluating whether the Court is doing a good job of communicating, we must look at how the Court communicates to the specialized audience that in turn is going to carry the message to the wider audience of people who will never in their entire lives hold a Supreme Court opinion in their hands.

The Court's relationship with the press is problematic at best. The Court is not so much hostile to the press as it is, often, oblivious to what the press needs in order to do an adequate job of describing the Court's work. I do not mean this comment as special pleading. To the extent the Court is oblivious to the needs of the press, it is oblivious to its need to communicate to the public.

I do not mean background briefings on the real meaning of opinions; I'm a realist. I understand the culture of an institution that has not changed much since the late Justice William Brennan spoke to a group of law students in 1959:

A great Chief Justice of my home State [Arthur Vanderbilt of New Jersey] was asked by a reporter to tell him what was meant by a passage in an opinion which had excited much lay comment. Replied the Chief Justice, "Sir, we write opinions, we don't explain them." This wasn't arrogance—it was his picturesque, if blunt, way of reminding the reporter that the reasons behind the social policy fostering an independent judiciary also require that the opinions by which judges support decisions must stand on their own merits without embellishment

32. Burke Marshall, *Foreword* to JOSEPH GOLDSTEIN, *THE INTELLIGIBLE CONSTITUTION: THE SUPREME COURT'S OBLIGATION TO MAINTAIN THE CONSTITUTION AS SOMETHING WE THE PEOPLE CAN UNDERSTAND*, at xx (1992).

33. GOLDSTEIN, *supra* note 32, at 19.

or comment from the judges who write or join them.³⁴

Now I do not mean sitting at the Justices' elbows or interviewing them behind the scenes on the deeper meanings of their opinions. Rather, I would have a more modest wish-list. The spacing of opinions, for example, sounds almost foolishly trivial as an issue. However, considering the number of finite commodities involved in digesting and reporting news about the Supreme Court (or about anything else for that matter), a finite amount of time to make the evening news or next day's newspaper, the finite amount of broadcast time or space in the paper, the finite number of human beings to handle the material, timing emerges as an important issue.

The Court always finishes its Term with a bang, with most of the major decisions coming in the last few weeks of June. That is only human. Like any other institution, the Justices save the hardest work for the end. In the Term that ended last June, for example, the Court on its final day issued 391 pages of opinions deciding four major cases: the Boy Scouts' right to exclude gay members,³⁵ the Nebraska partial birth abortion case,³⁶ a case on the permissible limits of federal aid to parochial schools,³⁷ and a First Amendment case on restrictions on demonstrations outside abortion clinics.³⁸ Earlier in the same week, the Court issued its decisions reaffirming *Miranda v. Arizona*,³⁹ striking down California's blanket primary system,⁴⁰ and issuing highly significant new rules requiring jury participation in criminal sentencing.⁴¹ Now, this was nothing compared to the last day of the 1987 Term when the Court handed down an entire

34. Remarks to the Student Legal Forum, University of Virginia Law School, Charlottesville, Virginia (Feb. 17, 1959) (unpublished).

35. *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (applying New Jersey's public accommodations law, requiring Boy Scouts to admit plaintiff, violated the Boy Scouts' First Amendment right of expressive association).

36. *Stenberg v. Carhart*, 530 U.S. 914 (2000) (holding that Nebraska statute banning "partial birth abortion" was unconstitutional).

37. *Mitchell v. Helms*, 530 U.S. 793 (2000) (holding that Chapter 2 of Title I of Elementary and Secondary Education Act of 1965, under which federal government distributes funds to state and local governmental agencies, does not violate the Establishment Clause of the First Amendment).

38. *Hill v. Colorado*, 530 U.S. 703 (2000) (holding that Colorado statute, prohibiting any person from knowingly approaching within eight feet of another person near a health care facility without that person's consent, did not violate the First Amendment).

39. *Dickerson v. United States*, 530 U.S. 428 (2000) (holding that *Miranda's* warning-based approach to determining admissibility of statement made by accused during custodial interrogation was constitutionally based, and could not be overruled by legislative act).

40. *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000) (holding that California's blanket primary violated political parties' First Amendment right of association).

41. *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (determining that any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt).

volume of U.S. Reports.

Ideally, newspapers and television networks would expand to fit the news from the Court, and people would be able to cover it all. I have written three, and on rare occasions, four Court stories in a day—not particularly well, by the third or fourth story, but if I can write them, my newspaper will probably print them. However, most of the media do not have my employer's priorities, and when opinions come in a huge rush like this, the triage is brutal.

I once mentioned this problem to Chief Justice Rehnquist, who listened sympathetically and then said, quite cordially, "Well, just because we put them out on one day doesn't mean you have to write them all on one day—save some for the next day." At that point, I lost all hope that we could ever have a meeting of the minds on the subject of the desirability of the Court—in its own interest and in the public interest—to accommodate the needs of the press.

Let us move on: assuming some minimal level of coherence and some minimal accommodation to the realities of press coverage—I would like to focus on candor. Is the Court being honest with its audience? Is the Court dealing squarely with precedent, or is it playing games with precedent? These are not just questions of style. They go to the reliable and orderly development of the law.

There are numerous recent examples of the Court not dealing squarely with precedent. One of my favorite examples is *United States v. Ursery*,⁴² a recent decision about the relationship between civil forfeiture and double jeopardy. *Ursery* grew out of the federal government's aggressive use of civil forfeiture as part of a multi-pronged strategy in the war on drugs. Property acquired as the result of drug dealing, or that served as the location of drug dealing, was targeted for forfeiture, either preceding or following the criminal conviction.

The obvious fly in this ointment was the fact that the Double Jeopardy Clause of the Fifth Amendment bars multiple punishments for the same offense. Whether civil forfeiture presented a double jeopardy problem, when added to a criminal conviction and sentence, depends on whether forfeiture is "punishment." If it is not punishment, then there is no problem.

In *Ursery*,⁴³ two federal appeals courts had found civil forfeiture to be a punishment sufficient to trigger the Fifth Amendment protection against double jeopardy.⁴⁴ Under those rulings, the government had to choose between two opinions. If it had already seized a drug dealers assets through civil forfeiture, it could not then go on and conduct a criminal prosecution. If it had already gotten a conviction, it had to forget about the forfeiture.

The Ninth Circuit and the Sixth Circuit did not pull that conclusion out of a hat. The appellate courts were informed by a series of very recent Supreme Court decisions that had in fact treated civil forfeiture as punishment. In *Austin*

42. 518 U.S. 267 (1996).

43. *Id.*

44. *United States v. \$405,089.23 U.S. Currency*, 56 F.3d 41 (9th Cir. 1995), *cert. granted sub nom*; *United States v. Ursery*, 59 F.3d 568 (6th Cir. 1995), *revd.* 518 U.S. 267 (1996).

v. United States,⁴⁵ the Court ruled that forfeiture could be so disproportionate to the offense as to amount to an excessive fine under the Eighth Amendment,⁴⁶ which is more generally known for its prohibition against cruel and unusual punishment.

This was obviously inconvenient for Chief Justice Rehnquist, the author of *United States v. Ursery*, who concluded that civil forfeiture was not punishment after all; therefore, double jeopardy did not occur.⁴⁷ This overruled two previous appellate court rulings. How did he reconcile the precedents and reach that conclusion? True, he wrote, forfeiture was punishment for Eighth Amendment purposes, but that interpretation of the Eighth Amendment should not be seen “as parallel to, or even related to, the Double Jeopardy Clause of the Fifth Amendment.”⁴⁸ Q.E.D., no problem.

Justice Stevens, in his dissenting opinion, noted that both the Fifth and Eighth amendments were drafted by the same people at the same time, and said it was “difficult to imagine why the Framers of the two Amendments would have required a particular sanction not to be excessive, but would have allowed it to be imposed multiple times for the same offense.”⁴⁹ So I leave it to you—was the majority being candid?

Another case in which precedent got rather short shrift was *Romer v. Evans*,⁵⁰ the decision that struck down, on equal protection grounds, Colorado’s constitutional amendment that barred any public entity in the state from adopting gay rights legislation. Justice Kennedy’s majority opinion did not even cite *Bowers v. Hardwick*,⁵¹ the Court’s 1986 decision holding that homosexual relations between consenting adults are not protected by the constitutional right to privacy. There were no doubt strong strategic reasons for Justice Kennedy to avoid any mention of *Bowers*, which is still on the books. He was not on the Court when it decided *Bowers*, but Justice Sandra Day O’Connor was a member of the *Bowers* majority, and avoiding mention of *Bowers* may have freed her to join the *Romer* majority without the explicit need to reconcile the two votes. Nonetheless, and despite the considerable merit of the *Romer* opinion, this was scarcely the most intellectually honest way of dealing with the state of the law. In fact, if a purpose of a Supreme Court decision is to guide the lower courts in the consistent development of the law, the success of the *Romer* decision is quite problematic.

As another example in this general discussion of candor, let me mention the decision in the physician-assisted suicide case, *Washington v. Glucksberg*.⁵² I cite this case for a slightly different purpose than our previous examples—to

45. 509 U.S. 602 (1993).

46. *Id.* at 620-21.

47. 518 U.S. at 297.

48. *Id.* at 286.

49. *Id.* at 308 n.5 (Stevens, J. dissenting).

50. 517 U.S. 620 (1996).

51. 478 U.S. 186 (1986).

52. 521 U.S. 702 (1997).

examine the candor issue not in the context of how the Court treats precedent—but of how the Court defines the question to be decided. In law, as in many other enterprises, where you begin has a lot to do with where you end up. What exactly was the Court being asked to decide in its review of the Washington criminal prohibition against physician—assisted suicide?

According to Chief Justice Rehnquist, the author of the Court's majority opinion, "The question presented in this case is whether Washington's prohibition against 'caus[ing]' or 'aid[ing]' a suicide offends the Fourteenth Amendment to the United States Constitution. We hold that it does not."⁵³

With the question framed in that way, in fact, every member of the Court agreed that the answer was "no," and the holding of the opinion, rejecting the constitutional claim, was unanimous. But that was not the only, or indeed the most accurate, way to describe the question that a group of doctors, on behalf of their dying patients, had brought to the Court. In concurring opinions, several Justices offered a different formulation of the question and suggested, that in subsequent cases, questions phrased that a much lower level of generality might produce a different answer.

Justice Souter said: "[H]ere we are faced with an individual claim not to a right on the part of just anyone to help anyone else commit suicide under any circumstances, but to the right of a narrow class to help others also in a narrow class under a set of limited circumstances."⁵⁴ Justice Breyer said flatly that he did not agree with the Chief Justice's formulation. He said:

I would not reject the respondents' claim without considering a different formulation, for which our legal tradition may provide greater support. That formulation would use words roughly like a 'right to die with dignity.' But irrespective of the exact words used, at its core would lie personal control over the manner of death, professional medical assistance, and the avoidance of unnecessary and severe physical suffering—combined.⁵⁵

The lens through which the Court looks at a particular case—the paradigm it chooses—can be so important, but difficult to evaluate unless the Court really grapples honestly and openly with its choice.

A subset of the candor issue is the question of consistency. Two recent decisions provided a striking example of the absence of consistency—might I suggest, of the result-orientation—in the Court's treatment of what it likes to call "bright line rules."

Both decisions were in criminal cases, both were Fourth Amendment cases, and both had to do with the encounter between police officers and people in cars. The first was *Ohio v. Robinette*.⁵⁶ The Ohio Supreme Court had ruled that once a police officer makes an otherwise valid traffic stop, that officer may not, in the

53. *Id.* at 705-06.

54. *Id.* at 773 (Souter, J. concurring).

55. *Id.* at 790 (Breyer, J., concurring).

56. 519 U.S. 33 (1996).

absence of any suspicion of further, hidden wrongdoing, begin interrogating the driver about whether he has drugs or other contraband in the car unless the officer first advises the driver that he does not have to answer these questions and is legally free to go.⁵⁷ Only that explicit advice can make a subsequent search, even one the driver has agreed to, truly consensual.

Not surprisingly, the Court, in *Robinette* overturned this decision, by an 8-1 vote, in an opinion by Chief Justice Rehnquist.⁵⁸ The Chief Justice said, in a rather weary tone, that the Court had said over and over again that the test under the Fourth Amendment was “reasonableness” and that the Ohio court had gone astray in trying to construct a bright line rule. “[W]e have consistently eschewed bright line rules,” he said, “instead emphasizing the fact-specific nature of the reasonableness inquiry.”⁵⁹

Then came *Maryland v. Wilson*,⁶⁰ another state appeal from a ruling by a state court. In this case, the Maryland Court of Special Appeals ruled that a police officer may not, as a matter of course and in the absence of any suspicion, order a passenger out of a car that was stopped because the driver was speeding or for some other routine reason.⁶¹ The Maryland court refused to extend to passengers the rule of *Pennsylvania v. Mimms*,⁶² a 1977 Supreme Court case holding that the police, for their own safety, may routinely order the driver out of the car during a routine traffic stop.⁶³

Not surprisingly, the Supreme Court overturned this decision as well, in another opinion by Chief Justice Rehnquist. The Court said the Maryland court was wrong in not adopting a bright line rule. “While there is not the same basis for ordering the passengers out of the car as there is for ordering the driver out, the additional intrusion on the passenger is minimal,”⁶⁴ the Chief Justice said. “We therefore hold that an officer making a traffic stop may order passengers to get out of the car pending completion of the stop.”⁶⁵ Well, so much for case by case assessment of Fourth Amendment reasonableness.

As a final subset of the candor issue, let me mention something that is perhaps a bit more elusive but equally important. How honestly does the Court confront the scope of what it’s accomplishing and the order of magnitude of the change it is bringing about?

To what extent does the Court owe the public a full accounting of exactly what is in play when obscure amendments which the average citizen has barely heard of, like the Tenth and Eleventh Amendments, are invoked to frustrate the

57. *State v. Robinette*, 653 N.E.2d 695, 699 (Ohio 1995), *rev'd sub nom.*, *Ohio v. Robinette*, 519 U.S. 33 (1996).

58. *Robinette*, 519 U.S. at 35.

59. *Id.* at 39.

60. 519 U.S. 408 (1997).

61. *State v. Wilson*, 664 A.2d 1, 13 (Md. Ct. Spec. App. 1995).

62. 434 U.S. 106 (1977).

63. *Id.* at 112.

64. *Wilson*, 519 U.S. at 415.

65. *Id.*

will of Congress? In subjecting Congress' use of the commerce power to a new kind of strict scrutiny, is the Court setting itself up as some kind of unaccountable, unelected, super legislature that some have discerned? Does the Court not owe us some hint as to how far it plans to go? Of course I understand that in our common law system, the law develops case by case and not necessarily according to a grand design, but there is a certain coyness to some of these opinions that one could argue serves to hide rather than illuminate what the Court is really up to.

Let me turn now to a different subject, the question of the Court's voice, or specifically, the voice of dissent. We certainly have to expect differences of opinion on the Court, especially on questions that divide the society of which, after all, the Court is only a mirror. But I think we can also expect these differences to be expressed without personal invective. In his dissenting opinion in *Romer*,⁶⁶ Justice Scalia's invocation of a "Kulturkampf,"⁶⁷ his excoriation of "the elite class from which the Members of this institution are selected,"⁶⁸ did not leave readers with confidence that the constitutionality of Colorado's Amendment 2 was being debated on the basis of legal principles rather than emotional invective.

Before we leave the question of the Court's voice, I want to touch on an elusive subject that for lack of a better word we might call institutional compassion. I do not mean compassion in the touchy-feely sense. Rather, what I want to convey is my sense that good judging requires some institutional ability to look at the world, or at the complaint, or at the appeal, from a point of view other than what might come naturally to the judge. I am not advocating knocking down precedents that stand inconveniently in the way of a sympathetic outcome. Nonetheless, I was rather amused recently by a pair of criminal cases, decided within a week of one another, that seemed to call for some comment along this line.

In one case, *Minnesota v. Carter*,⁶⁹ the question was whether the police violated the Fourth Amendment rights of the occupants of a ground floor apartment whom a police officer observed, while standing on the grass and looking through the crooked and not quite closed venetian blinds, engaged in the task of preparing cocaine for distribution. In upholding the criminal convictions, Chief Justice Rehnquist's majority opinion did not reach the underlying issue of the validity of the search, but rather held that the defendants did not even have standing to challenge the search because they were not the owners or renters of the apartment, but were just passing through, as temporary guests engaging in a business transaction.⁷⁰

The next week, in *Knowles v. Iowa*,⁷¹ the Court decided a criminal case with

66. 517 U.S. 620 (1996).

67. *Id.* at 636 (Scalia, J., dissenting).

68. *Id.*

69. 525 U.S. 83 (1998).

70. *Id.* at 91.

71. 525 U.S. 113 (1998).

a different outcome and quite a different flavor. The question was whether a simple speeding ticket could justify a police officer in conducting a search of the entire car. In this case, the Court quickly and unanimously, in another opinion by Chief Justice Rehnquist, said no, overturning a conviction for the marijuana the police had found in the speeding motorist's car.⁷² There was no justification for the further search, the Chief Justice said.

I do not want to be unfair, but looking at these two cases, it was hard to escape the sense that the Justices may have identified a bit more with someone stopped for speeding—as several of them have been—than with temporary denizens of a ground floor apartment in a housing project. The Justices were downright solicitous of the interests of the driver and quite dismissive of the privacy interests of the apartment's occupants, even though both had drug offenses in common. Is it possible the Justices could see themselves standing in the shoes of the one and not the other?

Let me move from voice to, what for lack of a better word, I will call reach. What should be the Court's stance toward its work? How directly should the Court confront the myth of judicial infallibility—what Professor Paul Gewirtz calls “the ideology of perfectionism”?⁷³ And should we give the Court points or demerits for admitting that some cases and some questions are just too hard for the Court to speak definitively about? After all, it was Justice Robert Jackson who said, in his great opinion in the flag salute case, “we act in these matters not by authority of our competence but by force of our commissions.”⁷⁴ We need a Supreme Court that at the end of the day is going to tell us what the law is.

But there is a new academic interest in what Professor Cass Sunstein of the University of Chicago calls “decisional minimalism” or “the constructive uses of silence.”⁷⁵ Minimalism is to be favored, according to this school of thought, when the Court is dealing with issues that are in flux, and on which democratic debate has not yet run its course. Professor Sunstein has high praise for the *Romer* opinion, which he calls “puzzling and opaque” and unsatisfying from a theoretical point of view, but from a broader institutional and political point of view, “a masterful stroke—an extraordinary and salutary moment in American law”⁷⁶ precisely because it said no more than it had to say to decide the case at hand while not foreclosing further development.

By the same token, Justice Breyer's unusual opinion in the Denver cable indecency case,⁷⁷ with which I began this address by citing the headnote, has won wide praise from academics although not, I hasten to add, from either practicing

72. *Id.* at 119.

73. Linda Greenhouse, *When a Justice Suffers from Indecision*, N.Y. TIMES, July 14, 1996, § 4, at 5.

74. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 640 (1943).

75. Cass R. Sunstein, *The Supreme Court 1995 Term: Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 6, 7 (1996). See also CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999).

76. *Id.* at 9.

77. *Denver Area Educ. Telecommunications Consortium v. FCC*, 518 U.S. 727 (1996).

lawyers or lower court judges, who have criticized the opinion for not giving adequate guidance on cable television's place in the First Amendment pantheon. Perhaps this disparity between academia and practitioners just goes to show how out of touch the law professors are, but I will use it to make a different point—it illustrates the different premises that go into evaluating the Court's work.

What Justice Breyer basically said in *Denver* was that the technology was moving so fast that the Court should not lock itself into a hard and fast set of First Amendment rules for evaluating indecency on cable television or more generally, for how traditional First Amendment doctrine applies to nontraditional media. Specifically, Justice Breyer said, "aware as we are of the changes taking place in the law, the technology, and the industrial structure related to telecommunications, . . . we believe it unwise and unnecessary definitively to pick one analogy or one specific set of words now."⁷⁸

Indeterminacy of this sort can undoubtedly sometimes be the better part of wisdom. Just as clearly, it has its dangers in the hands of a Court that does not quite know how to get where it wants to go. The Court's recent decisions involving affirmative action and, particularly, race-based redistricting, strike me as examples of inconclusiveness being more troublesome than helpful. Justice O'Connor's 1993 opinion in *Shaw v. Reno*,⁷⁹ which launched the Court on its ongoing examination of majority-black congressional districts, was extremely unsettling to the law and was highly charged rhetorically, using words such as "bizarre"⁸⁰ and "apartheid."⁸¹ But it never really explained whether the Equal Protection problem with these districts was their shape, the race consciousness with which they were created, or some inchoate and unpredictable combination of the two. Proof of how much difficulty the Court created for itself is that it had to review the constitutionality of the twelfth congressional district of North Carolina four times in seven years, because the rules were so unclear that the case kept coming back. The fourth argument for this case was held earlier this Term and a decision is due any day. I will be interested to see what lesson the Court derives from its recent experience.⁸²

On the other hand, I think the Court deserves substantial credit for the clarity with which it addressed the question of free speech on the Internet when it finally did reach that issue a couple of years ago, in a case that is not necessarily the Court's last word on the subject but was a very important first word.⁸³ In striking down the Communications Decency Act,⁸⁴ in its essentially unanimous opinion in *Reno v. American Civil Liberties Union*, the Court announced with great clarity that First Amendment principles apply fully to speech on the Internet and that the government can regulate speech in that forum only with the most

78. *Id.* at 742 (citations omitted).

79. 509 U.S. 630 (1993).

80. *Id.* at 631.

81. *Id.* at 647.

82. *See Hung v. Cromartie*, 532 U.S. 234 (2001).

83. *Reno v. Am. Civil Liberties Union*, 521 U.S. 844 (1997).

84. 47 U.S.C. § 223 (1994 & Supp. V 1999).

compelling of justifications.⁸⁵ Not only the result of that case, but the Court's clarity of expression, will have a major impact on the further development of this new medium.

The Court also deserves credit for setting out clear rules for both employers and employees on the question of sexual harassment in the workplace, and I give Justice Scalia credit for the clarity of his opinion for a unanimous Court recently, upholding the authority of the Environmental Protection Agency to issue regulations under the Clean Air Act⁸⁶ and re-burying the non-delegation doctrine that the D.C. Circuit had so provocatively revived two years before.⁸⁷

As I said earlier, my goal was to offer a kind of road map out of the election case that might help guide you in thinking about the Court in the months and years ahead. Much as we need and deserve a competent, candid, and comprehensive Supreme Court, the Court needs an attentive, informed citizenry to monitor, critique, and build upon its efforts.

85. 521 U.S. at 885.

86. 42 U.S.C. § 7401 (1994 & Supp. V 1999).

87. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001).

ORAL ARGUMENT: DOES IT MATTER?

WARREN D. WOLFSON*

I read somewhere that when Daniel Webster and other lawyers argued *Gibbons v. Ogden*¹ before the United States Supreme Court they took five days to do it.² That was 1824. Obviously, things have changed. Judges don't give lawyers that much time any more. In fact, in many cases, we don't give them any time.

I detect among judges a growing disdain for oral arguments. We don't look forward to them as much as we used to. They often are seen as an extra and unnecessary step in the proceedings. Why is that? Why are we hearing fewer oral arguments for shorter times?

In my own court, the First District Illinois Appellate Court, the numbers of oral arguments have been going down steadily, while the numbers of cases we decide have been going up slightly. In 1995, our district heard 938 oral arguments. In 2000, we heard 695 oral arguments—243 fewer. About twenty-five percent of the cases we decide are orally argued these days. I believe our numbers are fairly typical in intermediate courts around the country.

What's going on? Is it because judges think arguments are unworthy of their time—too many no-brainer cases? Or are the briefs so good we just don't need any more argument? Or is it because we don't have many Daniel Websters any more? Appellate judges will tell you sitting up there and listening to lawyers read prepared talks or their briefs is not our idea of a great time.

I think mostly it comes down to numbers. Our job is to decide cases, and we have a lot of cases. Oral argument slows things up. We begin to fall behind. That's not good. People grumble. So we begin a culling-out process. We decide the easy and clear cases without argument. Appeals that ask us to overturn a trial judge's findings of fact usually don't require argument, whether the case is civil or criminal. The same is true for attempts to overturn jury verdicts on the evidence.

We tend to schedule argument on the cases that contain interesting or troublesome legal issues. We look for cases of first impression, or cases where the stakes are high—in dollars, in the validity of statutes, in human confinement. You would think this selection process would heighten the significance of oral argument for judges. Maybe it does, but I am not sure it works that way.

When I was asked to address this topic—the significance of oral argument—I decided to do some research. I found a lot of articles by judges and lawyers on how to make effective oral arguments, but there is very little on whether the arguments matter or why they should. We do have some anecdotal evidence, and I have heard that the plural of anecdote is data, but we don't even have much in the way of anecdote. Let me briefly review the literature for you, although

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1. 22 U.S. 1 (1824).

2. See, e.g., William H. Rehnquist, *From Webster to Word-Processing: The Ascendancy of the Appellate Brief*, 1 J. APP. PRAC. & PROCESS 1, 3 (1999).

referring to it as “literature” might be excessive.

James Coleman, justice of the New Jersey Supreme Court, writes: “Many times a judge’s or justice’s pre-argument tentative position is changed based on the oral argument.”³ He didn’t say what he meant by “many times.” Judge Michael Kanne of the U.S. Court of Appeals for the Seventh Circuit believes oral arguments are important: “If it’s fifteen percent, that makes oral arguments worth doing and worth doing well.”⁴ Stanley Mosk, a California Supreme Court Justice, writes that he believes most appellate judges would agree that oral arguments performed effectively are of “crucial significance”—that they positively contribute to the decision-making process.⁵ He gives no percentages.

Compare Justice Mosk’s view with that of Ruggero Aldisert, Senior Judge of the U.S. Court of Appeals for the Third Circuit.⁶ He believes oral argument adds little to the ultimate result of a contested case. And, “[W]hen I change my mind at oral argument, more often than not it is because the performance at argument did not meet the promise of the brief. . . . [T]he case was not won at oral argument; it was lost.”⁷

Judge Richard Arnold of the U.S. Court of Appeals for the Eighth Circuit writes: “Oral argument is important to me because it is the only time that all of the members of the court and all of the lawyers are together to discuss the case.”⁸ Judge Arnold says that of 157 cases heard over a ten month period, oral argument failed to change his mind in 131 of them—twenty-six out of 157 is a 16.5 percent change of mind rate.⁹ Judge Joel Dubina of the U.S. Court of Appeals for the Eleventh Circuit writes that in many cases the helpfulness of oral argument is overrated, but that it can make a difference in a close case.¹⁰

I cannot end this survey of the literature without quoting from an article by a Texas lawyer, Brian Wice, who clerked for and then many times appeared before the Texas Court of Criminal Appeals: “[O]ral arguments are as useless today as the judges during my clerkship considered them Orals have become little more than a moot court exercise At the end of the day, you may have picked up points for style, but you have still lost your case.”¹¹ I have

3. James H. Coleman, Jr., *Oral Arguments: The Whats, Whys and Hows*, 7 N.J. LAW.: WKLY. NEWSPAPER 1747 (1998).

4. John Flynn Rooney, *Oral Argument Actually Can Actually Change Minds: Judge*, CHI. DAILY L. BULL., Nov. 18, 1994, at 1.

5. Stanley Mosk, *In Defense of Oral Argument*, 1 J. APP. PRAC. & PROCESS 25, 29-30 (1999).

6. *Id.* at 25 n.1 (quoting RUGGERO J. ALDISERT, WINNING ON APPEAL: BETTER BRIEFS AND ORAL ARGUMENT 294 (NITA rev. ed. 1996)).

7. *Id.*

8. *Id.* (citing Myron H. Bright & Richard S. Arnold, *Oral Argument? It May Be Crucial!*, A.B.A. J., Sept. 1984, at 69).

9. *Id.*

10. *Id.* at 27 n.5 (citing Joel F. Dubina, *From the Bench: Effective Oral Advocacy*, LITIG., Winter 1994, at 3, 4).

11. Brian W. Wice, *An Invitation to Persuade? We Decline*, 15 TEX. LAW. 32 (1999).

heard that representing criminal defendants in Texas leads to that kind of cynicism.

It should come as no surprise to you that I concluded the literature on the subject of oral argument and its significance isn't very helpful. I could not come to Indianapolis empty handed. So, I decided to do my own scientific survey. Well, a survey, anyway, something like Captain Ahab going fishing.

I met with sixteen judges of the Illinois Appellate Court, First District—which covers all of Cook County. My court. There are twenty-four judges in the First District. So, I had a good numerical sample. So far, so good. The problem was: how do I frame the questions to ask these judges? I came up with two questions for my survey. Whether the answers I received are of any value is still under consideration.

The first question was: Considering all the cases where you have heard oral arguments, in what percentage of those cases did the oral argument *affect* your decision concerning the outcome of the case? I was asking only about “affect”—not about whether the judge's view prevailed. And, I did not ask the judges to distinguish among arguments that changed their minds, that helped make up their minds, and those that affirmed a view already held. All I wanted in that first question was affect—admittedly not a precise term, but one we should recognize when we see it.

The answers to the first question ranged from 100 percent to zero percent. This tells you very little about the affect of oral argument, but quite a bit about our judges. Six of the responses were fifty percent or more. Four of them were between twenty percent and forty percent. And six of them were between zero and fifteen percent.

The answers to the second question might be more useful, or at least more interesting. The second question: In what percentage of those cases—cases where your decision was somehow affected—did the oral argument cause you to change your mind about the way an issue in the case should be decided? Obviously, the second question was slightly loaded. It made assumptions. It assumed the judge had at least read the briefs before argument and had formed an impression, if not a conclusion, about the outcome—a fairly safe assumption in our court, I am happy to report.

The answers to question number two ranged from zero percent by one judge to twenty percent by two judges. In all, ten judges said they changed their minds in five percent or fewer of the cases where oral argument had some affect. Two of them said ten percent. One was at 12.5 percent. One at fifteen percent. And then two at twenty percent. All this in the numerical universe defined by the presence of affect.

I am not a good enough statistician to tell you with any precision what all of this means, if anything. I believe the judges seriously addressed the two questions. If you take the answers at face value, it is safe to reach some conclusions—at least as far as our court is concerned.

There is a good chance oral argument will have an affect on judges, especially where cases set for argument have at least one interesting issue to begin with. How much affect? Not much, if you are concerned about a judge's change of mind. Perhaps a good amount if you are asking whether there is any

point to oral argument in the first place. It seems to have an analytical or thought-affirming impact. From the discussion that followed my survey, I can tell you our judges like oral argument. They would not do away with it. They regret they cannot do it more often.

For what it's worth, I will give you my view of the value of oral argument. My best estimate is that oral argument does affect the outcome at times. That is, it changes or makes up minds in about five to ten percent of the cases where we hear argument. That estimate might be generous. If the change of mind percentage is so small, is argument worth the time and trouble? I am convinced it is. We do not know which five or ten percent of the cases will change judicial minds. These include the lightning bolt arguments, the ones that make you say: "I never thought of that." Or, "Now I see." Or a simple: "Ahah!"

There are other substantial benefits to oral argument, aside from changing minds or making up minds. These other benefits more than make the case for oral arguments. Orals help me focus my thinking and clarify the issues. I see more of what matters and does not matter. This leads to better writing and helps avoid mistakes. Orals help me test my impressions and whatever conclusions I have reached. What did I miss? What should I have considered and did not? Was I about to do something stupid? Orals help me see the impact of what I have in mind. What worlds will tumble? How much damage would I do?

I should observe at this point that the benefits I see presuppose lawyers are prepared and reasonably intelligent. That is, they are ready to respond thoughtfully to questions of fact and law. Nothing kills the desire to hear oral argument more than lifeless lawyers who parrot mediocre briefs. It seems to be a law of nature that bad briefs lead to bad oral arguments.

Orals help me persuade my colleagues by asking questions I know the answers to—the beginning of a conference. They also give lawyers a chance to lose a case they might have won, not so much by arguing badly, but by not arguing at all an issue I was fond of. Orals give me a chance to ask about issues not raised in the briefs—such as jurisdiction or waiver. Orals provide an escape valve for lawyers and litigants. This is their chance to be heard and to provide an educational experience for everyone involved in the case. The proceeding is more public, less secretive. Finally, and of great importance, oral arguments get me into a courtroom, where I can see, hear, and talk to real people. I have a good time at oral argument. I like asking questions and getting answers. It energizes me. It provides an occasion to have lunch with colleagues.

If oral argument is to be meaningful, lawyers and judges have to strike a bargain—one that by necessity must remain unspoken. Lawyers must make and keep certain promises. First, they must not be boring. That means they must not read to us, repeat themselves, or simply repeat the words of the brief. And they must sound like they care. Dozing judges do not make a receptive audience.

Second, they must not argue weak, silly, or frivolous issues—which shouldn't be in the briefs in the first place. These are issues that will dilute the strength of serious matters. In the same vein, inconsistent positions deter judges from paying serious attention.

Third, needless to say, lawyers must be intimately familiar with the record and the cases they cite. Honesty and sincerity are imperative. If a lawyer

miscites authority or misrepresents the record, all is lost.

Fourth, lawyers must listen carefully and respond to our questions—whether they are asked of appellant or appellee. These questions signal the issues we care about. If the lawyer says, “I’ll get to that,” or “But that’s not this case,” or if he or she dances around the point, the lawyer’s chances are dismal. This is true not because the lawyer has failed to recognize the brilliance of the question, but because we assume he or she cannot provide a good answer. True, sometimes we overreact to a lawyer’s lack of enthusiasm for our questions, but so it goes.

I can’t overestimate the value of questions. They are the lawyer’s opportunity to persuade. Plato said “persuasion is the winning of souls through speech.”¹² For the purpose of these remarks, I have assumed, without deciding, that judges have souls and that lawyers have the power of speech. How do lawyers win our souls? Maybe by telling us how we might change lives when we decide the case—change them for the better or the worse. Maybe the questions that must be asked and answered by lawyers are: Why is this case worth being appealed? Why does the result matter?

This takes me to the fifth and final promise lawyers must make and keep. Give us reasons why we should rule in a certain way. Not just because a similar case points in that direction, but because it would be right and good and a proud moment in the law. In short, the lawyer must look beyond the confines of the case and gaze into the future, taking us with him or her.

I am sure there are appellate judges who would add other provisions to the lawyers’ part of the compact, but these are the ones I find most important. (I have not mentioned the sense of loss I feel when I observe that oral and written eloquence rarely occurs.)

I said this was to be a compact between lawyers and judges. Appellate judges, too, must make and keep promises. These are mutual obligations. We, too, are obligated to prepare. We have to read the briefs and not just pretend we have read them. Our court always begins by telling lawyers: “We have read the briefs, so don’t waste your valuable time by reciting the facts.”

In forty-four years of practice I never have heard an appellate judge say to a lawyer: “We have not read the briefs, so give us the facts, and do it slow.” Either the judges are doing their jobs or they have no sense of shame.

Beyond the briefs, one or more of us has to know the record, the relevant parts of it anyway. And, we have to have read the cited cases and important cases that are not cited. If we don’t do that, lawyers may as well speak in an obscure foreign language.

Our questions must be clear and serious—not asked to show how clever or humorous we can be. And we should give the lawyers a chance to answer the questions we ask. Sometimes we don’t. Asking questions to embarrass or ridicule is an abuse of our power. When I hear a judge begin a question with, “Do you mean to say . . .?” or “Are you telling us . . .?” I know there is a bully in the schoolyard.

One reason why it is so difficult to place a value on oral argument is that

12. PLATO, *GORGIAS* 453 (Terence Irwin trans., Oxford Univ. Press 1979).

judges are so different. We don't know the judge's state of mind when he or she takes the bench. Is the judge's mind made up? Tentatively made up? Completely open and noncommittal? Or not a clue? Oral argument can't work successfully when it digs in a dry well. Surely, it must be something more than an opportunity for us to read all the letters that have been piling up.

At last, a sum-up to the question before me: Do oral arguments matter?

They matter in the close cases. They aid the decision-making process. They bring a solemnity to the occasion. They begin a thoughtful exchange of ideas among judges. These are reasons enough to value oral argument highly. Short of that, there always is what may be, in the long run, the best reason—they get us out of the office.

I don't think we can talk about oral argument as some isolated issue. The question of significance is serious, and should be taken seriously. But it must be placed in the context of who we are and why we do what we do.

I believe I have learned a few things in the past twenty-six or so years on the bench, and what I have learned is what makes me look forward to oral arguments—every time. I have learned that we still can talk about ideals and principles without being embarrassed—even after all this time. We still can value personal liberty above power and expediency. We still understand that we have safeguards to enforce, and we enforce them because we know there are men and women whose appetites for power or property might exceed their moral wisdom.

We still understand hard-won rights can be lost simply by taking them for granted. We are reminded every day that we function in a public place where truth is truth and lies are lies, where people who act must be held accountable, and where the State is held to certain standards.

We don't need more laws and higher penalties. We need vigilance. And we need to hear about these matters, and talk about them, and think about them. Oral arguments and the conferences that follow them make great proving grounds.

Make no mistake—we have a love affair going here. We love our profession. We love what we do. The affair will endure and prevail so long as we bring to it loyalty, fidelity, and sincerity; so long as we approach it with the passion and consideration a lasting affair requires.

ADDRESS FROM CHIEF JUDGE EAGLES

SIDNEY S. EAGLES, JR.*

Good morning, ladies and gentlemen.

I appreciate you remaining here for the final segment of this extraordinary seminar on the “work horse courts”—the state intermediate appellate courts.

First, I would like to say “thank you” to Judge Najam and Chief Judge Sharpnack for inviting me to talk about the experiences of a relatively new court (thirty-three years old)—the North Carolina Court of Appeals—and how we see ourselves serving our various constituencies.

There are many opportunities for service at the state court of appeals. I am pleased and flattered to have been a court of appeals’ judge for over eighteen years. Never in my wildest dreams as a student planning to be a lawyer, or even as a young lawyer, did I imagine that I would ever be a judge of the second highest court of my home state. Most certainly, I never imagined that I would be chief judge of that court. There are days even now when I stop and think, usually not aloud, “What am I doing here?” Those of you who have experience in court administration may have some sympathy for my situation and may be amenable to offering a quiet prayer on my behalf. In any event, there are many opportunities for excellence at the state court of appeals. There are also many quiet problems which afflict us each day as we do our job.

The North Carolina Court of Appeals is, though not in law, the court of last resort for ninety-eight percent of the cases that come up on appeal. Except for capital cases in which the death penalty is actually part of the sentence imposed and general rate cases before the state utilities commission, *all appeals* come to the court of appeals.¹ Because we are relatively infrequently overruled, the North Carolina Court of Appeals is the court of last resort in fact for all other decisions of the district and superior court, the property tax commission, the utilities commission, the industrial commission (which hears claims against the State and workers’ compensation matters), the state personnel commission, and administrative law appeals from the office of administrative hearings.²

The breadth of our assignments is substantial. We hear almost all criminal cases, all family law cases, all juvenile cases, all administrative law cases, and every other litigated matter in state court except those few cases where the North Carolina Supreme Court chooses to consider a case on appeal or discretionary review prior to our determination. Our rules provide that the supreme court may reach down and take a case before or after our determination.³ That has happened on occasion in the past, but it is not a frequent occurrence.

That means that the fifteen judges on my court (we have just been enlarged from twelve) can expect to write upwards of 1600 written opinions each year (not counting special concurrences and dissents)—amounting to over one hundred

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1. See *State v. Black*, 172 S.E.2d 217 (N.C. Ct. App. 1970); N.C. R. APP. P. 4(d).

2. N.C. GEN. STAT. § 7A-27 (2001).

3. *Id.* § 7A-31.

cases per year, per judge. Our cases come from every level of court, quasi-judicial forum, and administrative agency, sometimes directly to us and sometimes through the superior court—our top trial court. The variety of work is wonderful, the diversity of written and oral advocacy is extraordinary and the creativity of our bar is refreshing. The precedential barriers in our work are fairly confining but manageable. As you might expect, we are bound by the doctrine of *stare decisis* to follow the precedents of our state supreme court in matters of state law. We must *consider* the opinions of the federal courts in matters of federal administrative agency determinations.

Our state supreme court decisions require us to follow prior decisions of panels of our own court on the same issue. This is sometimes quite interesting as we struggle to achieve justice without defying the rule of *stare decisis* and the mandate of *In re Civil Penalty*⁴ in these instances where two panels of our court have reached arguably conflicting results as to the same rule of law. Often, in analyzing competing cases, there may be room to distinguish the cases factually or on the legal issues. Sometimes there is room to point out inconsistencies and injustices as we grudgingly follow the higher court or prior court of appeals' precedent, without endorsing it enthusiastically.

Our fifteen judges all have offices in one building in Raleigh, North Carolina, and usually sit in the capital city. We see one another several times each week. We sit in constantly changing, rotating panels of three judges. The genius of this system is that the panels change every third court week. Although we may only rarely sit with the precise combination of judges that we would choose as our ideal or perfect panel, and we may have at least one person on our panel that we would prefer to swap for a judge who is more compatible and sympathetic to our way of evaluating cases, any of us can get along with anyone, no matter how intractable, for three weeks—some say that a seasoned court of appeals judge can hold her breath for three weeks.

Currently, however, our court is very collegial—all very friendly. The 2000 November elections having passed, we are pretty much at ease and not bitterly divided about the partisan politics of the world. There is, however, the potential for conflict since we are twelve Democrats and three Republicans, ten men and five women, eleven Caucasians and four African Americans, and are graduated from a variety of universities and colleges to which we have strong ties and loyalties. At least during basketball season, the rivalries among Duke University, the University of North Carolina, North Carolina State University, which does not have a law school, and Wake Forest University are pitched and somewhat strident, but almost always in good humor and bound up in the sense of friendly rivalry that good sportsmanship will dictate. Even this far from home, there is acknowledgment of the Atlantic Coast Conference and its legendary intra-conference basketball rivalry.

Because North Carolina Court of Appeals judges are elected on a partisan

4. *In re Civil Penalty*, 379 S.E.2d 30, 36-37 (N.C. 1989) (where panel of court of appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent).

ballot and statewide, we sometimes tend to whine about our situation. We are bound by our state's Code of Judicial Conduct and therefore may take no public position on controversial issues which many come before our court.⁵ That pretty well denies us of any really controversial speaking engagements and deprives us of any real public attention of a favorable sort. Now, let me hasten to say that if I or any other judge of our court does something strange or goofy, you can count on our being on the front page of the state's major newspapers.

There is great professional rivalry and friendly contests between the North Carolina Supreme Court and the North Carolina Court of Appeals. Our softball teams and our tennis tournament encounters have produced t-shirts where the high court referred to itself as "The Magnificent 7" and the court of appeals referred to ourselves, when we numbered only twelve, as "The Dirty Dozen." Off the sporting fields, however, we are, practically speaking, anonymous. The judges of the court of appeals often sardonically refer to ourselves as "The Invisible Court." As long as we produce well-reasoned and timely opinions obedient to the law and constitution, we are taken for granted. Usually then, we are anonymous.

Twenty years ago, a judge of our court was being sworn in by the Chief Judge, the late Earl Vaughn. Chief Judge Vaughn told a story, which he declared was true. He told of the widow lady from the small town of Eden in Rockingham County in rural North Carolina. She had two sons. One of the sons went away to sea and the other became a judge of the court of appeals. They shared a similar fate. Alas, neither one was ever heard from again. That is the plight of North Carolina Court of Appeals judges even today.

Being bound as we are by the principles of *stare decisis*, at the court of appeals we find ourselves often in the situation where fine distinctions are utilized to try to avoid what less impassioned thinkers might perceive as binding precedent. We try to avoid the disingenuous distinguishing of cases. Occasionally, however, even the best of us finds himself or herself in the difficult position of seeking to achieve justice and adherence to the spirit of the law, but having to distinguish a previous case on its facts.

In writing our opinions we find that we are writing for a great variety of separate audiences or constituencies—more in some cases than in others. First, we are writing to satisfy ourselves—to satisfy ourselves that this opinion is the best work we can do and is a correct application of the law to the relevant facts of this case. We need a clear conscience. We need to be personally comfortable that we have abided by our oath to follow the law and the North Carolina Constitution as well as the U.S. Constitution. We are writing to clarify the law, to state what the law is and to apply what we believe the law is to the facts as we understand them in the case.

Once we are satisfied personally, we turn to the task of satisfying our panel-mates. Opinions are circulated to the junior judge first and then to the more senior judge. The theory supporting this order of circulation is that a junior judge might be intimidated or unfairly influenced by the more senior colleague.

5. N.C. R. CT. C.J.C. CANON 3A(6) (2001).

Undoubtedly, this is a notion of an earlier day, but we still hold on to the tradition, though not rigidly. In the interest of time, where the case is old—approaching ninety days from oral argument—it may be circulated simultaneously with an appropriate disclaimer accompanying the opinion. At our court, immediately after oral argument, we conference to vote tentatively on disposition of the case. At that time each judge votes and may share her notions of what theory the opinion should rely upon and what theories will not suit a judge and any personal preferences or ideas about how the opinion ought to be framed.

Sometimes, after more in-depth research we find that our initial vote is not legally or logically sustainable. That is to say our research discloses a flaw in our logic, a failing in one of our premises or the absence of some key fact. In the parlance of my rural roots, we discover “that dog won’t hunt,” or put another way, “you just can’t get there from here.”

The consequence is that the opinion being circulated among the panel may bear scant resemblance to the post-argument conference discussion and vote. In any event, the opinion must be especially clear and self-sufficient—since there is no residual goodwill from conference that might have aided an opinion written and circulated as we voted initially.

During circulation, our fellow panel members may offer critical comments, suggestions, concurring opinions or dissenting opinions—all of which may stimulate clarification to our original circulated opinion. Since we all sit in one place, personal conferences and discussions often can render unnecessary additional memoranda being exchanged.

At this writing, the North Carolina Court of Appeals does not sit en banc. There is legislation pending to authorize en banc consideration, but a strong majority of our court (fourteen of fifteen) opposes the change.⁶ The North Carolina General Assembly is in session now so our practice may be changed by legislative enactment and an implementing supreme court rule, amended in response to enactment of authorizing legislation. I have survived the arrival of seven new appellate judges since January 1 (out of a total of fifteen judges), so I think I can survive en banc authority.

Once a court of appeals opinion is filed and survives a motion to rehear and, perhaps in the future, a petition for en banc consideration, it may be taken by the North Carolina Supreme Court. Actually, it could be considered by the supreme court at *any* time, but usually it waits until we have done our best. The routes to the supreme court vary according to whether the court of appeals opinion was unanimous. If there is a dissent, the losing party may appeal *as a matter of right* as to the issues in the dissent.⁷ As to other issues, review is by certiorari or petition for discretionary review—discretionary with the supreme court. Where there is no dissent, the court of appeals opinion is the last word unless the

6. S.B. 93, 2001 Leg. (N.C. 2001). On April 26, 2001, the bill was returned by the North Carolina House of Representatives to the Committee on the Judiciary. No further action has been taken on the bill since then.

7. N.C. GEN. STAT. § 7A-27 (2001); *id.* § 7A-30.

supreme court allows discretionary review.

Court of appeals' opinions must be straightforward, clear, and unambiguous so that when the supreme court is faced with a petition for discretionary review or certiorari to examine our work, or when our work is reviewed on appeal, it can build on what we have already accomplished. In those cases in which there is a dissent, we hope the supreme court will have no problem recognizing from the clear text of the opinion and the dissent, just what *we* think the controlling law is. One would think that the level of effort involved in making our view of the law clear to the supreme court would be less demanding than the amount of effort required to make our decision self-explanatory to the bar at large.

In addition, we write to point out errors and give instructions to the judges of the superior court and the district court. They are one of our most important audiences. If we are not clearly understandable to the trial court judges, the chances of further errors increase. The consequences for us are more second and subsequent appeals based on the trial courts' misunderstanding of our first opinion. Although we struggle to speak clearly to the trial court, I cannot count the times the trial transcript has revealed the trial court's frustration with our unclear, incomplete or imprecise direction.

We write our opinions to explain our decisions, not only for the supreme court and the trial courts, but also for the parties and their lawyers. Some of my judicial and academic colleagues suggest that we are writing to explain our decision to parties and lawyers on both sides of each appellate case. I suggest that in most cases, in reality, we are writing only for the losers on appeal. The winners of the cases often do not really care why they won. They are just very pleased that they did. The lawyers on the losing side, however, need to be satisfied that we have carefully analyzed the law and applied it in a clear and straightforward fashion to their case. They want to be assured that we understood all the facts (especially the facts favorable to their side) and that we understood the law and applied the law in a way that it is logical, coherent, and consistent with precedent and statutory intent, if applicable. The winner, as I say, really does not seem to care why she won as long as she won.

A wise, long since anonymous judge once disparaged the role of the appellate court as mere seekers of error while the trial court was immersed in the search for truth. Appellate judges want to be sure that our seeking to discover any prejudicial error serves the end of facilitating the search for the truth. Sometimes, however, even a winning litigant wants to understand our rationale, especially if the case may be the first of a series of cases or the critical basis for a client's major business decision. Actually, we must write to explain to both sides. The parties are one of our most important constituencies. Their satisfaction with the process is critical to public confidence in the courts.

The bar at large and the law news publishers also want to be able to read our opinions and understand what we have done to the law. Lawyers want to be able to rely on our decisions as understandable guidance for their current litigation as well as for litigation-avoidance advice to clients. They want our logic to be so clean, so clear, so unambiguous that their opponents cannot possibly misunderstand. But more important, the bar wants the trial judge to whom they present our decisions as precedents to immediately see the merit of the lawyer's

arguments and determine that their case is to be resolved in their client's favor because of our opinions. Any good litigator will concede, however, that she has often been able to settle a case (in the interests of justice, she would say) based on an ambiguity in an appellate opinion.

We also serve the legal media, including the specialized law publications, the West Reporter system, Lexis-Nexis and their various rivals, the official appellate reports of North Carolina, the statutory publishers' annotation editors, the Horn Book publishers and editors, and the law review editors and writers (students and faculty alike). Last, but not least, the *North Carolina Lawyers Weekly* is a splendid weekly publication that summarizes and comments on the holdings of the state courts, the federal courts, and the state administrative agencies. They present their work weekly in a lucid and timely fashion—a splendid tool for litigants and business lawyers dealing with high volume courts. Their reporting comes with early editorial analysis of our opinions that is not otherwise available even on the Internet. We electronically file all our published opinions and are in the process of resolving how to deal with our unpublished opinions. The ultimate decision will come from our rule-making authority—our state supreme court.⁸

In North Carolina, we are blessed by the presence of five excellent law schools.⁹ All have talented faculty and student writers who analyze, criticize and editorially discuss our opinions in law reviews and journals. The *North Carolina Law Review* does a year-end synopsis of our impact on North Carolina law—changes in the law by the supreme court and the sometimes subtle divergencies in competing opinions of the court of appeals. Our newest law school¹⁰ has for over twenty years prepared and mailed to the entire bar a free bimonthly newspaper¹¹ containing synopsis briefs of opinions of the court of appeals and the supreme court. While not as timely as *Lawyers Weekly*, it helps the bar to keep up with our decisions and the development of North Carolina law. This academic focus gives us much appreciated critical insight and not so subtle suggestions.

The general media reports and editors, however, tend not to be lawyers. They often are looking for what I refer to as “shout words,” which will be attention grabbers for the general public. In North Carolina most reporters covering the courts, certainly those reporters covering the appellate courts, by and large are extraordinarily well-informed. Though generally not legally educated or trained, they are longtime experienced career reporters who do their homework and expend considerable effort to be sure that what they report is both factually and interpretatively correct, or at least “in the ballpark.”

I hasten to say that the good reporters also solicit and welcome input from knowledgeable lawyers, sometimes off the record, to clarify their understanding about our decisions. This sort of healthy relationship between the media, the

8. *Id.* § 7A-25.

9. The five North Carolina law schools are Campbell University, Duke University, North Carolina Central University, the University of North Carolina, and Wake Forest University.

10. Norman Adrian Wiggins School of Law, Campbell University.

11. THE CAMPBELL OBSERVER.

practicing bar, and the courts has been indispensable to our success in assuring that the public is well informed. All parties are careful to respect the exclusive province of each other. Most appellate judges adhere scrupulously to the tradition that we do not comment for the record about our opinions—our opinion must speak for itself.

The court of appeals as an institution is faced by two realities. As Justice Robert Jackson suggested about the U.S. Supreme Court, we too know that in North Carolina the supreme court is not last just because they are right, but they are right because they are last.¹²

I believe that Justice Jackson's comment presents us with a dose of reality and is a good reason why our state's supreme court is very careful to be sure, as much as they can be, that they are logically and legally right whenever they reverse our decisions. Some observers might suggest that their capital case review function so completely occupies their energies that they are more lenient in their review of our work than they could be. I disagree.

The second reality is that the court of appeals, while not the "top dog," still has tremendous responsibility. Of our cases, fewer than two percent are reversed by the supreme court.

In calendar year 2000, of the 1500 plus cases which were determined in the court of appeals, fewer than thirty cases were reversed or modified and remanded by the high court. We would like it to be a perfect record but, of course, occasionally we disagree among ourselves and there are some continuing areas of the law whose development is being shaped by our state's highest court.

On the other hand, I want to hasten to remind myself, my colleagues on the state court of appeals, and you, that the state supreme court, at least in North Carolina, is very conscious of its prerogatives. For example, about fifteen years ago, an overambitious panel of our court determined that public policy required that the ancient torts of alienation of affections and criminal conversation should be abolished.¹³ As you may recall from your law school days, alienation of affections involves the right of redress by a spouse against a person who has seduced the aggrieved party's spouse who theretofore was happily married.¹⁴ The tort of criminal conversation gives the aggrieved spouse redress against one who has had sexual intercourse with his or her spouse.¹⁵ The court of appeals' panel, in some thirty odd pages of scholarly opinion, discussed the social policy, the change in society, modern trends and analytical failure of the cases involving early prosecutions for alienation of affections and criminal conversation. The supreme court in record speed, and with remarkable clarity and succinctness (three short paragraphs), summarily reversed the court of appeals, rejected the court of appeals opinion outright, and remanded the case for execution on the

12. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

13. *Cannon v. Miller*, 322 S.E.2d 780 (N.C. Ct. App. 1984), *vacated by* 327 S.E.2d 888 (N.C. 1985).

14. *Hankins v. Hankins*, 162 S.E. 766 (N.C. 1932).

15. *Sebastian v. Kluttz*, 170 S.E.2d 104 (N.C. Ct. App. 1969).

judgment.¹⁶ At least in North Carolina the court of appeals is very conscious of the high court's prerogative.

In my state our supreme court is constitutionally bound to sit at the state capital and may not conduct its business elsewhere around the state.¹⁷ Ours is a geographically large state, some 400 miles by 600 miles, with a population approaching eleven million. The work of educating and enhancing public appreciation of the courts and the administration of justice outside the state capital therefore must fall on the lesser courts. The North Carolina Court of Appeals routinely, in the dispatch of its regular business, sits at least once annually at each of the five law schools in North Carolina when we are invited. Our purpose is to demonstrate to young, soon-to-be lawyers, to the local media, and to the citizens of the geographic area in which these law schools are located that the administration of justice is the public's business and that the courts are attentive and sympathetic to the public's desire to know about its business firsthand.

In addition, budget constraints and the supreme court permitting,¹⁸ we have adopted a practice of sending a panel of three judges out to various local bar associations at the joint invitation of the senior resident superior court (the top local trial judge) and the president of the district bar. We send a panel to hear cases at remote locations, usually two or three times each year, in the western part of the state in the mountains, or in the western Piedmont, and two or three locations in the less populous agricultural regions of the eastern coastal plain of North Carolina. I confess to you that I prefer to go to the mountains in the fall and to the coast in the late spring. Those of you who are familiar with our climate can understand my logic.

As part of that traveling practice, we also ask that the local bar come together in a meeting where we can meet personally with them, informally hear their comments, listen to their criticisms of our work, and give them an opportunity to share with us their suggestions for improvement of our end of the administration of justice.

In addition, we make a real effort to make ourselves available to the local media, radio, newspaper, cable television, and in the cities, live network television. We are not in the same league with Judge Judy or Court TV, but we are reaching out to the citizens and especially students in high schools and colleges.

We invite students and their teachers to hear oral arguments. On occasion we have held our court sessions in facilities provided by the community colleges. In North Carolina, there are fifty-nine community colleges, all of which are splendid additions to local educational resources and great fora from which to demonstrate the justice system at work.

As part of the conduct of hearings in the local areas, the panel of judges usually, after the cases are heard, will answer questions from students about the

16. *Cannon v. Miller*, 327 S.E.2d 888 (1985).

17. N.C. CONST. art. IV, § 6(2).

18. N.C. GEN. STAT. § 7A-19(a) (2001).

process. We do not discuss the individual cases, of course, but talk about the process by which the cases are heard and the methodology by which they will be decided. All of this is available for radio or television broadcast, either live or taped for future use. By reaching out, we carry the complementary gospels of “open courts,” “independence of the judiciary,” and “the rule of law” all across the state to our ultimate constituency—the general public. Our goal is that even those who may not be among the educational elite will know that even the least of our citizens will have his or her rights protected in the North Carolina courts.

In addition to our primary audiences or constituencies, we have an indirect or collateral audience—the state legislature or “the General Assembly” as it is known in North Carolina. We all believe in the doctrine of “separation of powers” and our legislators usually profess not to be influenced by our opinions, reserving to themselves the ultimate prerogative of determining what the law is or ought to be. Even so, on occasion, a skillfully crafted opinion pointing out inequities in the application of a statutory enactment can produce some activity in the halls of the legislature. Sometimes even a dissent has a useful purpose when it refocuses legislative attention on a troublesome area of the law.

The telltale mark of a legislatively-aimed opinion often begins with this prefatory language: “Were we writing on a blank slate, we might find for the applicant but here we are bound by the strictures of the legislature to hold otherwise. The competing policies and arguments are persuasive, etc. but”¹⁹ Believe it or not, sometimes the legislators read and heed our expressions of concern.

In sum, we write to be true to ourselves and to our oath of office, but even the most high-minded among us is sensitive to the practical effects, intended and otherwise, that we sometimes have on our other audiences or constituencies.

19. See, e.g., *Stikeleather v. Willard*, 348 S.E.2d 607, 609 (N.C. Ct. App. 1986).

MANAGING CASEFLOW IN STATE INTERMEDIATE APPELLATE COURTS: WHAT MECHANISMS, PRACTICES, AND PROCEDURES CAN WORK TO REDUCE DELAY?

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ABSTRACT

American state intermediate appellate courts that succeed in handling their caseloads expeditiously have taken responsibility for the entire appellate process, beginning with the filing of the notice of appeal. They have recognized the public interest in minimizing delays, have committed themselves to deciding cases in a timely manner, and have mobilized themselves to pay sustained attention to effective case processing. While resources are important to an appellate court's effectiveness in handling its caseload, how the resources are actually *used*—i.e., what caseload management strategies and techniques are employed by the court—can make a significant difference in case processing

time. Further, the traditions or culture of the court, as well as the leadership and commitment of the chief judge, play a very important role in the case processing time.

Those are central findings of the Appellate Caseflow Management Improvement Project, conducted by the Justice Management Institute (JMI) under a grant from the State Justice Institute. The project was designed to build on what has been learned through previous studies, focusing particularly on how appeals are processed in six intermediate appellate courts: two in Ohio, two in Washington State, and the statewide courts in Maryland and New Mexico. The report presents basic information about workloads, resources, operating procedures, and case processing time in the six courts and documents a number of difficulties in making cross-jurisdictional comparisons of appellate case processing times. Despite the methodological difficulties, the researchers were able to see major differences among the courts and to identify a number of common problems that impede effective case processing.

Key operational problems identified as common to many appellate courts include delays in the preparation and filing of trial court transcripts, delays in the appointment of appellate counsel for indigent defendants, case overloads facing attorneys responsible for handling appeals in small law offices and in the offices of major institutional litigants, leniency on the part of appellate courts in the granting of extensions of time to file briefs, the sheer complexity of some cases, and (in some courts) the existence of a large backlog of undecided cases. Among mechanisms proven successful in assisting intermediate appellate courts with reducing delays and improving performance, those that involve monitoring and troubleshooting stood out. Often, technological innovations make it possible to conduct some activities far more swiftly and efficiently than in the past, but they rarely reduce the need for ongoing supervision of the process.

Looking to the future, the report recommends three initiatives to help catalyze action—and, ultimately, significant improvements—in state intermediate appellate courts: development of a system for regularly collecting and publishing comparable data on the workloads, resources, structures, operating procedures, productivity, and case processing times of intermediate appellate courts; design, implementation, and evaluation of demonstration projects that incorporate an array of modern procedures and technologies and are aimed at significantly improving the expeditiousness of appellate case processing; and design and presentation of educational programs, focused on appellate caseflow management, for judges and court staff members.

I. OVERVIEW OF THE PROJECT AND THIS REPORT

A. Objectives of the Project

Fair and timely resolution of cases is at the heart of the business of the courts and is essential for public confidence in the courts. It is as true in appellate courts as in trial courts that “justice delayed is justice denied.” In some ways, appellate delays are especially pernicious:

- Appellate delays prolong litigation and undermine the public interest in final

resolution of litigants' disputes. Parties on appeal remain enmeshed in the dispute process and are unable to get on with their lives and business.

- Reversal of a trial court decision or remand for further proceedings extends a dispute even longer. The longer the appellate process takes, the more likely it is that witnesses will be unavailable, memories will fade, and evidence will be stale when the case is again before the trial court.
- Appellate delays affect not only the parties to the case that is delayed, but also the actions of others who are involved in cases that have similar facts and issues, thereby contributing to uncertainty in law and in business and social relationships.
- Lengthy appellate delays disregard well-documented public concern about court delay. When appellate courts cannot manage their business well, they contribute to a negative model of court processes and tend to undermine public trust in the legal system.

The relatively little research that has been conducted on case processing times in appellate courts has tended to focus first on the basic task of documenting how extensive the delay is and next on seeking to ascertain which of several factors—resources, court structure, procedures, or management, to name those most frequently mentioned—best explains variations across courts in the pace of appellate litigation. This project has been designed to build on previous work in the field and to produce practical tools to enable appellate court judges and managers to reduce backlog and delay. The aim has been to develop a better understanding of why some appellate courts are able to handle their business (or stages of that business) expeditiously while others are much slower; and learn why and how the expeditious courts have been able to overcome the obstacles that plague the slower courts, with particular attention given to techniques that intermediate appellate courts have used to reduce backlogs as part of an overall delay reduction program. The project has had three main objectives:

- To broaden the base of practical knowledge about how appellate courts function and about variables that affect appellate delays;
- To identify approaches and techniques that work effectively in minimizing delays in appellate decision-making, without compromising the quality of the decisionmaking; and
- To develop work products—including a self-assessment guide and a final report that has recommendations for practical steps that can be taken to reduce appellate backlogs and delays—that can be used by appellate courts interested in reducing backlogs and delays and in generally improving appellate court caseflow management.

In conducting the project, we have interviewed more than fifty persons: appellate judges; appellate court clerks and administrators; judicial adjuncts; conference, settlement, and staff attorneys in appellate courts; appellate counsel from state attorneys-general's offices and public defender offices; attorneys in private practice; and academic observers. The six courts studied provided case processing data to the extent that they were able, and we have worked with them to refine the data for use in comparative presentation. The difficulties involved in this process are discussed in the report. We are also appreciative of the

interest shown by thirty-five members of the National Conference of Appellate Court Clerks who attended a focus group we conducted on appellate court case processing improvements at their annual seminar.

By examining policies and procedures in six intermediate appellate courts that vary considerably in the speed at which they handle cases—three relatively fast, three somewhat slower in processing cases; two pairs within states, two other state-wide courts—we seek to move closer to identifying strategies and techniques that can be broadly applicable in reducing appellate delays. If each court is examined more closely, however, it can be seen that the strategies and mechanisms used by these courts to manage their caseloads are closely linked to the long-term attitudes and practices that the court has developed toward its work and its clientele. In Part II we present brief snapshots of these courts by way of framing the analysis of how they operate.

The report has four key themes. First, courts that have succeeded in reducing appellate delay have organized and mobilized themselves toward this goal. These courts, and in particular, their leaders, have recognized the problem of appellate delays as one meriting their sustained attention. They have developed and implemented particular mechanisms deemed appropriate for each court and its environment.

Second, successful courts have communicated their intentions and actions in reducing appellate delay to the bar, especially, and also to the executive branch and to legislative appropriating bodies, litigants, and the public.¹ Appellate courts that have recognized the growing interdependency of courts within the greater communities they serve have been able to increase their abilities to meet the rising expectations of effective performance.

Third, the expeditious courts, along with requiring those litigating before them to observe the time limits set by rules, have in turn committed themselves to deciding cases in a timely manner. These courts have instituted procedures to ensure that cases do not linger in one tardy judge's chambers or get lost in the many cracks between chambers of participating judges. Their judges have reviewed the argued-and-undecided docket frequently and determined how they can best work together to hash out problems delaying a decision.

Lastly, the courts that have dealt effectively with delay have learned that the court must accept responsibility for taking control of the entire appellate process from the filing of the initial notice or petition through issuance of the opinion or other ruling and any en banc procedures. For effective appellate courts, there has been no real division of cases among so-called "lawyer time" and "judge time." Rather, the entire process has been viewed as an integrated one. Expeditious courts have monitored preparation of the trial transcript and the clerk's record, ensured the efficient handling of motions and timely filing of briefs and appendices, and issued opinions promptly.

1. Examples of communication as discussed here are examined in *infra* Part IV.

B. The Project's Approach

This project has examined specific methods used in each of the six participating courts to handle its caseloads. Because the value of any individual technique cannot be definitively evaluated by assessing its impact in only one court, we have not presented any view as to the overall effectiveness of a particular approach or method in itself. Instead, we have sought to gauge how well an approach or method served the court employing it in resolving cases expeditiously.

Examining the processes used in individual courts helps us gain a sense of what general approaches and specific mechanisms contribute to expeditious case processing in appellate courts. As Joy Chapper and Roger Hanson observed some years ago, trial court caseload management principles are clearly applicable to appellate courts.² Even as a trial court's culture influences the pace of litigation,³ it is similarly the case that in the small, somewhat cloistered world of appellate courts, the prevailing culture of the court is likely to help explain how speedily and effectively the appellate court handles its caseload. Although the relationship to resources may become important—especially in how the court deals with augmenting the resources needed to litigate by the major institutional litigants who appear before the judges (the appellate sections of state or county prosecutorial and public defender offices)—even the most useful mechanisms intermediate appellate courts employ to produce speedier case processing often arise directly from the courts' own cultures.

In addressing issues of appellate case processing, it is important to keep in mind the significant difference in magnitude between appellate courts and trial courts. In contrast to trial judges, intermediate appellate judges still work on relatively small case dockets. Individual appellate judges work on hundreds rather than thousands of cases, and they normally write decisions in far fewer than 100 cases a year.

Additionally, appellate courts are collegial bodies. They hear cases in panels (typically consisting of three judges, but sometimes more) and the decision-making processes—both for individual cases and for caseload management policy—tend to be more complex than those of trial courts. The ability of judges even in large-volume intermediate appellate courts to retain a focus on the particular case looms large in any effort to assess the ways in which these courts function. "Every court has its own culture" was the way one intermediate appellate court judge, bent on changing the way her court operated, described to one of the authors how judges in that court tended to spend the same amount of time on each of their cases, regardless of the differences in complexity among them. While recognizing that national-scope judicial education and training programs could shape a new judge's view of how an appellate court should

2. JOY A. CHAPPER & ROGER A. HANSON, NAT'L CTR. FOR STATE COURTS, INTERMEDIATE APPELLATE COURTS: IMPROVING CASE PROCESSING 9-10 (1990).

3. THOMAS W. CHURCH ET AL., JUSTICE DELAYED: THE PACE OF LITIGATION IN URBAN TRIAL COURTS 54 (1978).

function, far more important in the change-oriented judge's view was the immediate and particular court world to which the new judge returned.

C. Rationale for Studying Intermediate Courts

The project focuses on intermediate appellate courts ("IACs") because these are the courts in which the great bulk of appellate cases are resolved. Unlike state courts of last resort, IACs have limited power to control their caseloads. Most receive and dispose of far greater numbers of cases than do state supreme courts. In a few states, the court of last resort exercises great control over the intermediate appellate court or courts by sifting through appeals to select those that should proceed to direct review in the highest court and sending others to the intermediate court.⁴ In addition, the highest courts may decide which intermediate appellate court opinions are approved for publication. Indeed, in some states, the issuance of a highest court opinion even results in the expunging of the intermediate court ruling.

While state courts of last resort often play a leadership role through their exercise of general superintendence authority over the court system, intermediate appellate courts normally have no other assignment than to resolve the cases brought to them for decision. They are the "work horses" of appellate litigation in most states. In total, there were almost 200,000 cases filed in 1998 in state intermediate appellate courts.⁵ Expeditious resolution of these cases is important for the litigants in these cases and for public confidence in the courts.

D. Information Needs

There has been only sporadic attention to determining the extent and sources of delay in state appellate courts, and much remains to be done even to provide reliable information at regular intervals that describes how long these courts take to dispose of their cases. For example, there is no regularly available national report of times between filing and disposition for state appellate courts. An effort to gather such data was made for several years and discontinued almost two decades ago.⁶ The most recent national-scope study made great efforts to assemble this information and contained 1993 statistics from thirty-five intermediate appellate courts.⁷ No one has since continued to provide this information on a national level. As discussed in Part II, this project's comparatively modest effort to collect comparable data from the six participating

4. The Maryland Court of Appeals, the state's highest court, may decide to take cases directly, through its review of all cases when they are first filed in the intermediate court of special appeals. This is also a practice employed in Massachusetts.

5. EXAMINING THE WORK OF STATE COURTS, 1998, at 87 (Brian J. Ostrom & Neal B. Kauder eds., 1979) (reporting the total cases filed in 1998 as 199,558).

6. See, e.g., NAT'L CTR. FOR STATE COURTS, STATE COURT ANNUAL REPORT 1981 and 1985. In 1981, this continuing series reported time-in-stages and on-appeal information for fewer than ten IACs. By 1985, the table had been eliminated from the report.

7. See ROGER A. HANSON, NAT'L CTR. FOR STATE COURTS, TIME ON APPEAL 5 (1996).

courts, using the courts' own reports on case processing times, achieved only limited success.

E. Earlier Studies

There have been three principal comparative studies of appellate case processing time, each conducted by researchers for the National Center for State Courts. This section briefly summarizes approaches and key conclusions from those three projects.

1. *Martin and Prescott's 1981 Report*.—John Martin and Elizabeth Prescott analyzed data collected on appellate cases filed during 1975-76 in seven intermediate appellate courts and three courts of last resort.⁸ They found that the courts varied dramatically in the time required to process cases, with average total time in intermediate appellate courts ranging from 240 to 649 days. Looking at the relationship between volume and case processing times, they found that courts with larger caseloads took no longer (or only slightly longer) to process their cases than did courts with smaller caseloads. They also found—surprisingly—that courts with more filings per judge were appreciably faster than courts with fewer cases per judge. Martin and Prescott noted that the lack of a positive statistical relationship between case volume and delay did not mean that there was no interrelationship, but stressed that the problem was much more complex than too many cases for too few judges. Perhaps their most important conclusion was that the structure and procedures of appellate courts appeared to have a greater impact on case processing time than did the number or type of cases filed. Optimistically, they emphasized that “state appellate courts are not . . . at the mercy of . . . ever-increasing caseloads. When necessary, [they] can modify their structure and organization or adjust their procedures to meet the demands of larger caseloads.”⁹ In their words, “Workable solutions to delay are available. However, each appellate court is in many ways a unique system. No single solution or set of solutions will necessarily solve every court's problems. Solutions must be developed within the context of a particular court's goals, needs, structure, and organization.”¹⁰

2. *Chapper and Hanson's Study of Four Intermediate Appellate Courts*.—A decade after the Martin and Prescott study was completed, Joy Chapper and Roger Hanson conducted a comparative study of four state intermediate appellate courts, drawing on case record data from appeals filed in 1986 and 1987.¹¹ Several of their key findings have been especially relevant for the work of this project:

- Intermediate appellate courts differ in their subject matter jurisdiction. Consequently, there are considerable differences across the courts in the

8. JOHN A. MARTIN & ELIZABETH A. PRESCOTT, *APPELLATE COURT DELAY*, at xii & n.1 (Michael J. Hudson ed., 1981).

9. *Id.* at xxi.

10. *Id.*

11. See CHAPPER & HANSON, *supra* note 2, at xv.

composition of their caseloads.¹²

- “The volume of appeals filed or docketed overstates a court’s actual workload,” because many appeals “are dismissed or abandoned before they reach the court for consideration.”¹³
- None of the courts had what could be described as a comprehensive case management system, with “information on and control over the processing of every appeal from the time a notice of appeal is filed.”¹⁴
- The courts varied in their concern for overall appeal time. All of them “pa[id] particular attention to the time between submission” of briefs and the court’s decision, and three had information on elapsed times during this period. However, “considerably less data [were] available in most of the courts on the time consumed by other stages of the appellate process.”¹⁵
- Principles distilled from the trial court experience with caseflow management—including exercising early and continuous control, creating the expectation that scheduled events will take place as planned, and monitoring case processing time—have clear parallels in appellate court case processing. However, “these principles will not be applied fully until information systems are organized to provide decisions upon which appropriate management decisions can be based.”¹⁶
- Not all appellate courts collect case-processing time information, and there is little documentation of key aspects of court operations, including caseload composition, appeal attrition, and procedures for handling appeals with various characteristics. The unavailability of this sort of information makes it difficult for appellate courts to identify problems or opportunities for improvement, precludes them from assessing their own performance in relation to others, and makes it difficult to undertake meaningful cross-court analysis of the limited caseload and case processing time data that do exist.¹⁷

3. *Hanson’s Time on Appeal Study*.—The most recent comparative study of appellate case processing time, conducted by Roger Hanson, used data from appeals resolved during 1993 in thirty-five intermediate appellate courts.¹⁸ The data indicate that although a few IACs handle their cases very expeditiously, the vast majority can fairly be characterized as being somewhat slow to very slow. Only five of the thirty-five intermediate appellate courts studied met one primary “reference model” incorporated in the American Bar Association’s (ABA) standards for timely disposition of appellate cases: completion of at least seventy-five percent of all cases within 290 days. Four of the five were

12. *Id.* at vi, 4-5. Chapper and Hanson noted, however, that there were some similarities across the courts in terms of the areas of underlying civil law and types of criminal offenses that were involved in appellate cases.

13. *Id.*

14. *Id.* at 55.

15. *Id.* at 57.

16. *Id.* at vii.

17. *Id.* at 61-62.

18. HANSON, *supra* note 7, at 5.

specialized intermediate appellate courts—i.e., courts handling only civil appeals or only criminal appeals. Nine courts took at least 580 days, twice the ABA standard, to resolve seventy-five percent of their cases. Hanson concluded that four main factors contributed to slower case processing:

- resources—in particular, having more appeals per law clerk;
- method of selecting the presiding or chief judge—slower courts tended to select their chiefs by an internal procedure such as seniority or election by the bench;
- regional, rather than statewide, jurisdiction; and
- procedural characteristics—for example, “requir[ing] a reasoned opinion in every case” and placing no limitations on oral argument.¹⁹

After conducting a regression analysis of the 1993 data, supplemented with some new information on selected managerial aspects of the courts, Hanson subsequently concluded that resources—in particular, the number of judges and law clerks in relation to filings—are the key determinants of appellate court expeditiousness.²⁰ He took the view that how the resources and mechanisms were utilized—what might be called the management factor—was less influential, although he acknowledged that “[b]asic principles of modern case management did appear to encourage timeliness.”²¹

F. Organization of the Report

The remainder of this report is organized in four Parts. Part II presents snapshot profiles of the six courts, information about their workloads and resources, and data on case processing times in the courts. It also includes a discussion of key problems affecting caseload management that emerge from a review of the quantitative data and from interviews with appellate practitioners. Part III focuses on ways in which new technology can be used to address appellate caseload problems and produce substantially more expeditious resolution of appeals. Part IV draws on information acquired in this project plus insights from earlier research in both trial and appellate courts to develop a framework for future efforts for improving appellate caseload. Part V outlines recommendations for specific appellate caseload management initiatives.

There are three appendices. Appendix A is a note on the impact of technology on appellate caseload management, prepared by Dr. Roger Hanson. It supplements the material in Part III, focusing particularly on management information systems, issue tracking, and electronic filing. Appendix B is a catalog—or simple listing—of appellate caseload management mechanisms and techniques that have been proposed (and in some instances implemented) over the past three decades. Appendix C is an “Appellate Court Caseload Management Self-Assessment Questionnaire” that can be used by practitioners

19. *Id.* at 39-40.

20. See Roger A. Hanson, *Resources: The Key to Determining Time on Appeal*, CT. REV., Fall 1998, at 34, 42-43.

21. *Id.* at 35.

to gauge their own court's effectiveness on key dimensions of appellate caseload management.

In examining the work of the six courts and preparing this report, we have sought to build upon insights from the earlier studies without uncritically accepting their conclusions. For example, the relative importance of resources vis-à-vis caseload management strategies remains for us an open question. However, some of the observations of earlier research—notably the consistent findings that court caseloads and case management practices vary widely, and that information is seldom used well for caseload management and problem solving—have been helpful in framing our own work. It is our sense that both resources and management strategies are important. Resources are essential, but how they are used—what the court's clerk, judges, law clerks, staff attorneys, and other staff members actually *do* after a notice of appeal is filed, what standards and expectations they set for themselves and for the appellate bar, and what combination of caseload management techniques they employ—seems to make a significant difference, as do the traditions and general culture of individual courts. This report does not contain definitive findings, but it should help to advance general understanding of how appellate courts function at the start of the twenty-first century. It should be viewed as primarily an effort to describe appellate processes, to spotlight key issues, and to identify opportunities and strategies for improvement.

II. CASELOADS, RESOURCES, AND CASE PROCESSING IN THE SIX COURTS

Managing cases to produce fair and timely decisions should be a primary goal of every intermediate appellate court. However, studies have shown that most appellate courts do not decide cases as quickly as national standards (and the experience of some courts) suggest is possible.²² Some appellate courts, though, have become more adept than others at moving cases more speedily and effectively from filing to disposition. The six courts studied in this project reflect this diversity: three could be fairly characterized as relatively expeditious and one stands in the middle. The other two courts, although still processing cases at a relatively slower speed, have in recent years recorded progress in reducing the total time that their cases are on appeal. The six courts and their locations are:

- Maryland Court of Special Appeals (Annapolis)
- New Mexico Court of Appeals (Santa Fe)
- Ohio Court of Appeals, Eighth District (Cleveland)
- Ohio Court of Appeals, Tenth District (Columbus)
- Washington Court of Appeals, Division I (Seattle)

22. See JUDICIAL ADMIN. DIV., AM. BAR ASS'N, STANDARDS RELATING TO APPELLATE COURTS §§ 3.50-3.57 and accompanying commentary (1994). Roger A. Hanson's book entitled *Time on Appeal* is the most recent of several studies confirming the overall slowness of appellate caseload processing nationally. HANSON, *supra* note 7; see also CHAPPER & HANSON, *supra* note 2; MARTIN & PRESCOTT, *supra* note 8.

- Washington Court of Appeals, Division II (Tacoma)

This Part provides an overview of case processing in each of the six courts. It begins with a brief description of each court, followed by tables providing an overview of the workloads and human resources (judges, other judicial officers, law clerks, and staff attorneys) available to handle the caseloads in the six courts. Following a discussion of the courts' varying approaches to managing their caseloads, we present data on case processing times, overall and by major stages of the appellate process. The Part concludes with a discussion of key problems affecting appellate caseload management that emerge from analysis of the quantitative data and from interviews with judges and court staff members in the six participating courts.

A. Profiles of the Six Courts

The judicial complements of all six of the courts studied in this project are filled by popular election, although the chief or presiding judges are selected either by the governor or by the judges of the court. All of the courts assign cases to three-judge panels for consideration, with some courts having authority to rehear cases en banc following panel decision. Each of the courts has some kind of screening mechanism that is used to assign cases that meet certain criteria to different calendars featuring full or expedited/summary procedures. Jurisdiction of these courts is almost entirely mandatory: each court must review all of the cases brought to it, with no authority on its part to exercise selectivity in determining which cases it will adjudicate. (By contrast, most appellate courts of last resort exercise considerable discretion in deciding which cases to accept for review.) Only the term of the Maryland court's chief judge is indefinite; in each of the other courts, the chief or presiding judge serves a one- or two-year term, although these may be renewable.

1. *Maryland Court of Special Appeals*.—This thirteen-judge court is Maryland's statewide intermediate appellate court. Six of the judges are elected statewide and seven from the state's judicial circuits, while the chief judge is selected by the governor. Most jurisdiction is nondiscretionary. Each judge has two law clerks and a secretary. The court's central staff attorneys prepare recommendations on applications for allowance of appeal and proposed opinions in substantive summary docket cases and most criminal cases submitted on briefs. The court has been implementing a new information system. Civil cases may be sent for a prehearing conference if one screening judge so determines. Although most court reporters in the state use computer-aided transcription (CAT) to prepare appellate transcripts, the filing of civil records is slow. One major procedural technique helps keep cases on schedule: after the clerk's office reviews the record, a scheduling order is issued setting the month of argument. Cases are assigned to panels at least a month before the argument month.

2. *New Mexico Court of Appeals*.—This ten-judge court is the state's single intermediate appellate court. The chief judge, selected by vote of the full court, has traditionally been the most senior judge actively sitting on the court and serves a two-year term. The court's jurisdiction, which is almost all nondiscretionary, has been enlarged as the Supreme Court of New Mexico has

increased the discretionary sector of its jurisdiction.

In sparsely-populated New Mexico, the majority of the population lives in or around the Albuquerque and Santa Fe areas. The court hears argument primarily in those two locations, but also sits on occasion in Las Cruces, Carlsbad, Las Vegas, and Roswell. The court has a backlog problem, which may arise from the fact that it has had one of the largest increases in filings sustained by any state intermediate appellate court. Significantly, its backlog has not grown out of proportion to the increases in filings. The court is implementing a sorely-needed improved information system.

3. *Ohio Court of Appeals for the Eighth District.*—The Eighth District is Cuyahoga County, which includes the city of Cleveland. This twelve-judge court sits in four panels of three judges each. The court has been able to operate on a four-panel basis for almost ten years since it last acquired more judges. Jurisdiction is primarily mandatory. The presiding judge serves a renewable one-year term and exercises administrative authority through a small staff headed by the court administrator. There is a good working relationship with the appellate section of the elected clerk of court's office, which is responsible for entry of all filed documents into the information system. The information system dates back to 1984 and has been upgraded three times; there is a systems manager on staff. Chambers staff have full access to the system and secretaries in chambers release decisions. Opinion summaries are distributed to the judges to avoid conflicts between panel rulings.

4. *Ohio Court of Appeals for the Tenth District.*—The Tenth District consists of only Franklin County, which includes Columbus, the state capital. Because of its location in the state capital, this eight-judge court has many administrative cases (denominated as "original actions") on the docket. Each presiding judge has previously served as administrative judge. (This is a relatively standard progression in Ohio Courts of Appeals, with a different judge filling each post on an annual basis.) The court's information system, the Ohio Appellate System Information System (OASIS), is maintained through the Franklin County data processing center under the supervision of the County Auditor. All trial courts except probate are on the data processing system and all judges get full quarterly reports.

5. *Washington Court of Appeals, Division I.*—The Washington Court of Appeals comprises three divisions, located in Seattle, Tacoma, and Spokane. All three divisions elect a presiding chief judge for the entire court of appeals. The presiding chief judge serves as the chairperson of the full court executive committee. Division I has ten judges who receive appeals from three districts that include six counties, of which King County, where Seattle is located, is the largest. The judges of the division elect their chief judge and acting chief judge; the latter is usually preparing to become chief judge. Four appellate commissioners and seven staff attorneys assist in processing the Division's workload. As part of the Division's calendar management efforts, the judges of the court have adopted an accelerated sitting schedule whereby oral argument terms are scheduled approximately every six weeks. A term consists of two weeks sitting followed by four weeks in chambers. Cases are now assigned to the three-judge panels two terms in advance.

6. *Washington Court of Appeals, Division II.*—This seven-judge court is located in Tacoma and receives appeals from three districts that include thirteen counties. As with Division I, this division elects its own chief judge to direct its administration, as well as an acting chief judge, who is considered to be preparing to become the next chief judge. Every case, except for motions on the merits and *Anders* petitions,²³ is screened after briefing by an extern or intern. After this screening, a memorandum is prepared for review by a judge, recommending one of four ratings. Rating I means that the case is one that presents a typical sufficiency of evidence claim. It is less complex than a motion on the merits. Rating II is a court-initiated motion on the merits. There is no way for a party to challenge this rating. Rating III is a case that is suitable for the “no-oral argument” calendar. It is resolved by an unpublished opinion. Rating IV is a case that will end up fully briefed and on the oral argument calendar. All judges vote on the rating to be assigned to a case. Deference is given to the highest category chosen by any one of the judges. All divisions of the court participate in the statewide appellate information system, ACORDS, and the appellate clerks have led the effort to standardize data fields and reporting categories among the three divisions.

Table 1 provides an overview of the six courts’ geographic jurisdiction, size, governance structures, and available judicial officer, law clerk and central staff attorney resources.²⁴

B. Filings and Resources

As Chapper and Hanson noted in their 1990 report, the volume of appeals filed in a court “overstates a court’s actual workload,” because a substantial number of appeals are dismissed or abandoned before they are ever considered by the court.²⁵ The attrition rates vary significantly by court, further complicating the problems of cross-court comparisons.²⁶ Nevertheless, given the difficulties of developing accurate data from each court on precisely what cases

23. Under *Anders v. California*, 386 U.S. 738 (1967), a court is required to afford a full internal review to any motion to withdraw from representing the indigent client based on asserted lack of appealable issues by court-appointed counsel in a criminal case. *Id.* at 744. After requiring counsel to submit a brief discussing each potential issue, and affording the client a chance to respond, “the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous.” *Id.* Reviewing these petitions of counsel (and usually the entire trial transcript) has been commonly assigned to central staff counsel by many appellate courts.

24. See *infra* tbl.1. Data regarding number of staff attorneys and law clerks is from ROGER A. HANSON ET AL., *THE WORK OF APPELLATE COURT LEGAL STAFF* (2000), which contains extensive information regarding the varied ways in which these attorneys are used, as well as information obtained from interviews with court personnel. Supplemental information was obtained from the Washington state courts website: <http://www.courts.wa.gov> (last visited Jan. 28, 2002).

25. CHAPPER & HANSON, *supra* note 2, at vi.

26. See *id.* at 10-11.

(and how many) wash out, total filings are an appropriate starting point for assessing the volume of an appellate court's business.

In terms of filings, the six courts included in this study represent the mid-range of American state intermediate appellate courts. The Maryland and Ohio Eighth District (Cleveland) courts receive about 2000 cases annually, while the Ohio Tenth District (Columbus) and Washington Division I (Seattle) record about 1500 filings each year. Filings in the New Mexico and Washington Division II (Tacoma) courts approximate around 1000 annually.²⁷ The size of the benches also reflect the makeup of the great majority of intermediate appellate tribunals. The largest courts in terms of volume measured by filings—Maryland and Ohio Eighth—have the most judges, thirteen and twelve, respectively. The sizes of the others, however, do not correlate to the volume of the cases filed. The middle-range volume courts, Ohio Tenth and Washington I, have eight and ten judges, respectively, and the smaller-volume courts, New Mexico and Washington II, have ten and seven, respectively.

As Roger Hanson has emphasized, judges are not the only resources available to help appellate courts resolve cases. Hanson's research suggests that the most important correlates of expeditious case processing time are relatively fewer appeals filed per judge; and more legal staff assigned to individual judges.²⁸

The courts participating in this study have somewhat different arrangements with respect to both the number of non-judge resources and the ways in which these resources are used. Table 2 provides an overview of the number of filings in relation to the various judicial resources available to each of the courts.²⁹

As Table 2 shows, there is a very wide variation in the number of filings per judge, ranging from ninety-five per judge in New Mexico to 188 per judge in the Tenth District of Ohio and Washington Division I. The variations are much less marked when the number of filings is examined in relation to the number of law clerks (range = 75-95) or to the total judicial resource complement (range = 27-49).

C. Trends in Filings and Dispositions, 1997-99

Tables 3-A and 3-B show that the volume of filings did not change dramatically in any of the courts during the 1998-99 period.³⁰ However, filings in the two Washington courts decreased somewhat from 1998 to 1999. Both courts took advantage of the decrease in filing to increase the number of dispositions and thus reduce the backlog of unresolved cases. By contrast, while filings also declined in the two Ohio courts during this period, these declines did not stimulate any significant increase in dispositions.

27. See *infra* tbls.3-A, 3-B.

28. Hanson, *supra* note 20, at 42.

29. See *infra* tbl.2.

30. See *infra* tbls.3-A, 3-B.

D. Approaches to Court Organization and Caseflow Management

As the data in Table 1 indicate, the six courts in this project have different types of non-judge resources available to them. For example, judges in the New Mexico Court of Appeals have only one law clerk each, while the judges in all of the other courts have two. However, the New Mexico court has the largest complement of central staff attorneys. Three of the courts (Ohio Tenth and the two Washington courts) have judicial officers (three appellate magistrates in the Ohio Tenth; commissioners in the Washington courts) who have authority to handle some types of matters that in other courts would come before the judges.

Comparing the approaches used by the Ohio Tenth and New Mexico courts illustrates how resources can be used in different ways that are tailored to the needs of each court's jurisdiction and caseload composition. The Ohio Tenth, which (along with Washington I) has the largest number of filings per judge (see Table 1), is able to handle 1500 cases annually with only eight judges because it uses both appellate magistrates and pre-hearing counsel to handle the initial stages of a great many appeals. The three appellate magistrates hear worker compensation and prisoner rights cases from all over the state (special statewide jurisdictional responsibilities of this court arise from its location in the state capital) and prepare preliminary decisions. These cases account for about one-third of the court's caseload, and the work of the magistrates enables the judges to review the cases in a more cursory manner. Additionally, in a typical year the court's pre-hearing counsel hold conferences in about 500 cases and manage to dispose of almost 200 of these through settlement, withdrawal, or other disposition.

In contrast, the New Mexico court focuses first on identifying and expediting a large number of relatively uncomplicated cases, assigning about half of the fifteen staff attorneys to prepare calendaring memoranda for the court's use in assigning cases to tracks and expediting decisions. This work, along with the ongoing involvement of a calendaring judge, enables the court to make effective use of a summary calendar. About half of the court's cases are handled on the summary calendar in an average of slightly over five months from initial filing. The remainder of the central staff attorney group conducts legal research on cases on the court's general calendar.

The two markedly different processing routes used by the Ohio Tenth and the New Mexico court for some categories of cases are representative of the kinds of varying approaches that different IACs use for particular jurisdictional areas. Most intermediate appellate courts have some types of jurisdiction for which they use special procedures. In addition to the Ohio Tenth's use of appellate magistrates for some administrative law appeals and New Mexico's use of a summary calendar, the two Washington courts have established abbreviated procedures for review through what is called a "motion on the merits." These motions are decided by commissioners, who are judicial adjuncts. In 1998, approximately eighteen percent of Division I's decisions and thirty-four percent of Division II's decisions came on these motions on the merits.

After separating some special categories of cases (for example, the worker compensation and prisoner rights cases handled by the appellate magistrates in

Ohio Tenth) as well as the cases that have been settled or withdrawn or have been disposed of through summary processes, appellate courts confront what is generally regarded as the core of their caseloads: fully-briefed appeals to be decided on the merits, usually after oral argument. This group is likely to be appreciably smaller than the court's total filings. The New Mexico court for example, disposed of 451 cases on its summary calendar in 1999-2000, compared with a total of 309 cases on its other three calendars (general transcript, tape, and legal). The fact that appellate courts assign certain categories of appeals to special processing routes adds further complications to the task of attempting cross-court comparisons. The categories of cases assigned to special routes vary by court, and so do the routes themselves. Rather than producing a broadly similar core of fully-briefed appeals, the use of these approaches is more likely to leave us with less comparable end groups of cases.

E. Case Processing Times in the Six Courts: Methodological Issues and Rough Comparisons

Comparing case processing time data across appellate courts remains problematic. As noted above, the geographic and subject matter jurisdictions differ in significant respects, the levels of resources and the ways in which available resources are allocated vary considerably, and the procedural approaches for handling particular categories of cases vary as well.

In this project, resource constraints have made it impossible to collect data on the time between events directly from court records. Instead, we have sought to use case processing time reports generated by the courts themselves. There are three main difficulties with this approach: the six courts report data on caseloads and court calendars that are dissimilar in terms of caseload composition; some of the courts changed their statistical procedures during the course of this project; and the courts use different measures to report the information on case processing times.

Three of the courts (Maryland and the two Washington courts) can provide case processing time data in a fashion that enables comparison of their performance with the American Bar Association standards for appellate case processing. (Those standards call for seventy-five percent of all appeals to be completed within 290 days from the filing of the notice of appeal and ninety-five percent within 365 days.) However, the other three courts follow a different approach. The information reported by each court is as follows:

- *Maryland*.—The judicial information system has been able to generate reports showing the time required to complete seventy-five percent and ninety-five percent of the cases, although the judicial branch annual report presents average times, using days and months in different tables.
- *New Mexico*.—The court reports average times from filing to disposition for cases on both the “regular” calendar and the summary calendar.
- *Ohio—Eighth District*.—The court reports average times from filing to disposition for regular and accelerated docket cases. The average times for cases decided on the merits and those disposed of prior to such decision are reported separately. The court also maintains statistics on compliance with

the time standards established by the Ohio Supreme Court.

- *Ohio—Tenth District.*—The court maintains time statistics only in the format used by the Supreme Court of Ohio to measure compliance with its guidelines. Thus, in addition to filing and termination data, the reports present the number of cases pending, and of those, the number pending beyond the periods set by the guidelines for disposition. The Supreme Court's guidelines call for disposition of all cases within 210 days, but for original actions to be disposed of within 180 days.
- *Washington—Divisions I and II.*—Effective with the 1998 statistics, both courts changed their reports to follow the seventy-fifth percentile and ninety-fifth percentile of terminations format. Other definitions were also altered. Consequently, the 1998 and later data are not directly comparable to pre-1998 numbers. These figures only include cases that proceed through the appellate process to merits decision.

It should be noted that, in reporting data on their own case processing times, most of the courts do not include in the statistics those cases that are disposed of by order prior to the record being filed, briefs submitted, or decision rendered. Such exclusions typically involve appeals that are withdrawn, settled, or dismissed on motion. The result of excluding cases with these types of dispositions from statistics on case processing time is that the cases disposed of most quickly are not included in the calculations of case processing time.

Despite the problems that the different reporting formats create for undertaking cross-court comparisons, there are advantages to using them for this report:

- The reports already exist; special data collection efforts are not needed.
- The data are more current than would be possible if special data collection efforts were undertaken.
- Although different courts use different measures of case processing time, it is possible to see major differences among courts. In particular, it is possible to see which courts operate expeditiously and which ones are very slow.
- The lack of common measures in the reports highlights the need for national standards and for a national effort to report regularly meaningful data on appellate courts' caseloads and performance.

The most comparable data in Table 4-A include: for five courts, average times from filing to decision in all cases; for three courts, the number of days required to resolve seventy-five percent and ninety-five percent of civil and criminal appeals; and, for the two Ohio courts, the percentages of cases pending longer than Ohio's 210-day filing-to-disposition standard.³¹

The overall case processing times (notice of appeal to disposition) reported by each court for the years 1998 and 1999 are shown in Tables 4-B and 4-C.³²

Table 4-A shows that, of the five courts that may be compared on the basis of average processing times, the Maryland court appears to be the fastest overall, although New Mexico and the Ohio Eighth District resolve cases on their

31. See *infra* tbl.4-A.

32. See *infra* tbls.4-B, 4-C.

summary calendars even more rapidly. Tables 4-B and 4-C indicate that the Ohio Eighth District processes “non-merits” cases (cases that are disposed of prior to full consideration by the court “on the merits”) very quickly. However, it is not possible to compare these data to data from the other courts.

Of the three courts that report case processing times in comparison to the ABA standards, the Maryland court is consistently the fastest by far in handling appeals in both criminal and civil cases. Even though direct comparison of the Ohio Tenth District with most of the other courts is not possible because of differing report formats, Table 4-A shows that the Ohio Tenth consistently had a smaller percentage of cases pending longer than the 210 days called for by state guidelines than did the Ohio Eighth. While both Ohio courts appear to be relatively fast, the Ohio Tenth District manages to get as many as seventy percent of its cases decided within 210 days. The New Mexico Court of Appeals appears to handle its summary calendar cases quite expeditiously, but takes considerably longer with its regular fully-briefed appeals. The two Washington courts have made progress in reducing their total processing times: from 1998 to 1999, each reduced its total average time by almost five percent. While the times remain lengthy, both courts lowered their total average processing times and Division I brought its average processing time below eighteen months, an interim goal that had been set when these courts began in 1997 to emphasize speedier resolution of cases.³³

The appellate process can be divided into several stages. Table 5 shows the average times reported by five of the courts for four distinct stages of the process:

1. The filing of the notice of appeal to the filing of the record in the appellate court.
2. The filing of the record to the completion of briefing (defined as the filing of the appellee’s brief).
3. Completion of briefing to the submission of the case (if no oral argument is held) or to the oral argument.
4. Submission or oral argument to decision by the court.³⁴

The “time in stages” data shown in Table 5 is helpful in identifying ways in which some of the courts seem to be functioning effectively and areas that clearly need attention. Several points stand out.

First, preparation of the record (including the trial transcript) is clearly a problem for most of the courts. Only the Ohio Eighth District Court has kept the notice-to-record stage at an average of less than two months. For three of the other courts, and for Maryland in civil cases, this stage takes between approximately four and six months. Records on appeal in criminal cases in Maryland, however, are prepared relatively expeditiously, averaging a little more than two months.

Second, the courts vary widely in the time required for briefing. Maryland and New Mexico manage to keep brief preparation to an average of three to four months. While this is longer than court rules contemplate, it appears to be much

33. See discussion *infra* Part IV.

34. See *infra* tbl.5.

shorter than the time consumed by briefing in the other courts.

Third, the period of time that cases are before the court (from completion of briefing until decision [Stages 3 and 4 in Table 5]) varies widely. The Ohio Eighth District judges decide cases very expeditiously, taking only slightly more than a month after the case is argued or submitted to issue a decision. However, in 1999, cases in that court took an average of over seven months between briefing and submission. The Maryland court decides both civil and criminal appeals rapidly. New Mexico handles the cases on its summary calendar very quickly but cases on the regular calendar require an average of about seven months from submission of briefs to decision.³⁵

F. Common Problems and Issues: An Agenda for Change

In addition to obtaining reports on case processing times, project staff also visited each of the six courts and conducted interviews with judges and court staff members. Taking account of both the quantitative data and the information and ideas obtained through interviews, it is possible to identify a set of problems and issues that are common to most of the courts involved in this project and, in all likelihood, to most state intermediate appellate courts. To some extent, the problems can be categorized as falling into one of the several stages of the appellate process. However, there are some issues that cut across all of the stages and involve core issues of appellate court goals, leadership, organization, and interrelationships with other components of the justice system and the larger society. The following is a brief inventory of the key problems that emerged from this study.

1. *Problems in the Initial Stages of the Appellate Process.*—One of the perennial problems in appellate court administration has been the preparation of the record. In order to prepare briefs for the appellate court, appellate lawyers need to be able to review the transcript of previous proceedings in the trial court and have access to other potentially relevant sections of the record, such as pleadings, motions, decisions on motions, and exhibits. Although the technology for very rapid transcription of court proceedings has existed for over two decades, slow production of transcripts remains a major problem for appellate case processing in most jurisdictions. Among the courts participating in this study, only the Ohio Eighth District has succeeded in getting records filed in less than two months.

35. During the period of this study, the Washington courts were in the midst of making major efforts to reduce the time consumed during the stage from briefing to decision. A special study conducted at the end of 1999 in the Division I Court disclosed, for example, that for cases set on the December 1999 oral argument calendar, the time from completion of briefing to argument for the seventy-fifth percentile case had been cut to 139 days (132 days in criminal cases and 143 days in civil cases) from 255 days in 1998. Letter from Judge Faye C. Kennedy, Washington Court of Appeals, Division I, to Richard B. Hoffman (Jan. 13, 2000) (on file with author). Both of these courts recognized that they had serious backlog problems and have been revamping their calendaring process and decisional routines to become current.

In addition to the problems of slow transcript production, other problems in the initial stages of case processing that are common to some or all of these six courts include:

- delays in the appointment of appellate counsel for indigent defendants, sometimes occasioned by the unavailability of public defenders;
- slow disposition by the trial court of motions to waive filing fees and settle the record;
- poor quality of some audio or video tape records when those methods are used for making a record of proceedings in the trial court; and
- delays within the office of institutional litigants (e.g., district attorney, public defender, and attorney general) in transferring responsibility for cases from the attorney who handled the case in the trial court to the attorney who will be responsible for appellate litigation, including designation of portions of the record.

2. Problems in the Briefing Stage of the Appellate Process.—The appellant's lawyer can sometimes begin preparing a brief even before the record is formally filed with the appellate court, especially if there is no trial transcript involved. Much more commonly, however, preparation of the brief does not begin until after (sometimes long after) the record is filed.

There are two main problems that impede expeditious preparation and filing of briefs. First, both in the offices of major institutional litigants, such as the prosecutor and public defender, and in many small law offices, the attorneys responsible for the appeals are (or feel) overloaded with work. Lack of resources is a chronic complaint on the part of institutional litigants, and work overload is very often a reason for requesting extensions of time to prepare and file briefs. Second (and closely related to the institutional litigants' shortages of appellate lawyers), many appellate courts—including several of the courts in this project—have relatively lenient policies on granting extensions of time. To some extent, the leniency reflects the courts' recognition of the time and resource problems faced by the litigants. In some instances, it is also a reflection of the courts' own backlog problem—granting an extension for filing the brief means one less case that the court must soon hear and decide.

3. Problems in the Court's Calendaring and Resolution of Cases.—As Table 5 indicates, IACs vary widely in the speed with which they calendar and decide cases once the briefs have been filed. While there are a myriad of reasons for delays in these stages of the process, four broad categories of problems can be identified:

- the lack of clear policies providing for expeditious scheduling of dates for oral argument or submission of the case without argument;
- cumbersome decision-making and opinion preparation policies;
- lack of mechanisms for managing the decision-making process and holding individual judges accountable for the prompt preparation of opinions for which they are responsible;
- the reality that some cases are particularly complex, involving trial records that need thorough review and contain difficult legal issues that must be researched; and
- the existence of a large backlog of undecided cases.

4. *Issues of Court Goals, Leadership, Organization, and Interrelationships with Other Justice System Components.*—Although some of the problems in appellate case processing are essentially mechanical or procedural (for example, prompt production of trial transcripts and rapid appointment of appellate counsel for indigent defendants), others involve basic questions about the responsibilities of appellate courts and the relative importance to be accorded to competing values that affect the work of judges and staff. These issues are addressed in more detail in Parts III and IV. At this point, we simply list key topics and questions that emerge from our research.

- *Goals.* What goals or standards, if any, should an appellate court have with respect to the expeditious resolution of cases? To what extent should any such goals (and, by extension, the responsibilities of the court) cover the “pre-court” stages of record preparation and briefing?
- *Leadership.* What are (or should be) the responsibilities with respect to expeditious case processing of appellate court chief judges, presiding judges of panels, court clerks, chief staff attorneys, and others who hold formal leadership positions in intermediate appellate courts? What are or should be the responsibilities of others in key justice system leadership positions?
- *Information.* What types of information relevant to management of the court’s caseload should court leaders routinely receive? How should they use the information? What information should routinely be provided to the bar, the public, legislative bodies, and the media?
- *Policies and Procedures.* What changes in policies and procedures are needed to achieve the level of quality and expeditiousness that the litigants, the bar, and the public deserve? To what extent can such changes be accomplished by the intermediate appellate courts alone, without the necessity of new legislation or action by the state’s supreme court?
- *Technology.* How can modern technological innovations be used to markedly accelerate the generally slow pace of appellate litigation?
- *Education and Training.* What do appellate judges and staff members need to know about effective caseload management? How can they learn?

In the next two Parts—one focusing on uses of technology (Part III) and one on the key elements of effective caseload management (Part IV)—we examine what can be learned from the experiences of the six courts involved in this project and from other sources about practical strategies for improving appellate caseload management.

III. USING TECHNOLOGY TO IMPROVE APPELLATE CASEFLOW MANAGEMENT

All six of the intermediate appellate courts in this study make some use of modern technology to help with the management of caseloads and resolution of cases. For example, all of the courts make use of electronic legal research services, all have computerized management information systems, and all use e-mail for at least some purposes, including circulation of drafts of opinions. To date, however, none of them have been able to use modern technology to make the kind of dramatic improvements in appellate case processing that are at least theoretically possible. Commenting upon the limited use made of technology in

most appellate courts, Philip Talmadge, a former justice of the Washington Supreme Court, recently wrote that:

Many appellate courts are doing their work at the dawn of the twenty-first century in a fashion not entirely dissimilar to the way they were doing their work at the dawn of the twentieth. Appellate courts process paper files physically transmitted to them by the trial courts. Appellate judges and their staffs read paper briefs. Upon the publication of a written opinion, the paper record is placed in physical storage. Too often, because of resistance from attorneys, staff, and the judges themselves, and because resources are unavailable to move to an electronic environment, appellate courts have not utilized new technology that can facilitate the business of those courts.³⁶

This Part focuses on five modern technologies that, if used effectively (and in combination with sound overall caseflow management strategies), could markedly expedite the resolution of appellate cases. These technologies include:

- computer-aided transcription (CAT) to rapidly produce transcripts of trial proceedings;
- electronic filing of trial court records and appellate briefs;
- videoconferencing;
- computer-based issue tracking; and
- computer-based management information systems.

A. Computer-Aided Transcription

Delays in the production of trial transcripts have often been cited as a primary cause of slow appellate case processing.³⁷ The development of technology that will enable very rapid production of accurate transcripts holds the potential for markedly accelerating at least the initial stages of appellate case processing. Because there is at least some evidence that rapid completion of the record preparation stage correlates with more expeditious overall case processing,³⁸ it seems likely that rapid transcript production will contribute to a speedier overall appellate process.

The technology exists. As long ago as the mid-1970s, researchers at the National Center for State Courts determined that computer-aided transcription (CAT) was technologically feasible and could dramatically reduce delays in transcript production.³⁹ Since then, the technology has improved, costs of the

36. Philip A. Talmadge, *New Technologies and Appellate Practice*, 2 J. APP. PRAC. & PROCESS 363, 363 (2000).

37. See, e.g., PAUL D. CARRINGTON ET AL., JUSTICE ON APPEAL 62 (1976); MARTIN & PRESCOTT, *supra* note 8, at 28.

38. Cf. MARTIN & PRESCOTT, *supra* note 8, at 53 (discussing time “from ordering the record to the filing of the last brief”).

39. See J. MICHAEL GREENWOOD & JERRY R. TOLLAR, EVALUATION GUIDEBOOK TO COMPUTER-AIDED TRANSCRIPTION 2 (1975); J. MICHAEL GREENWOOD & JERRY R. TOLLAR, USERS’

equipment have become much cheaper, the use of this technology has spread widely through the court reporting field, and the skills of reporters using CAT have improved markedly.⁴⁰

CAT is a form of shorthand reporting that uses a computer to automate the process of reading and translating stenotype notes into English. Court reporters using the CAT technology record the words spoken in court by making keystrokes on a stenotype machine that produces shorthand notes. In addition to the notes appearing on the traditionally-used folded paper tape, the keystrokes are also recorded on an electronic storage medium, such as a computer diskette. The disk is then removed from the stenewriter and inserted into a computer's disk drive. Software then converts the stenographic notes into English text, allowing spellchecking and editing functions to be performed. The software accesses the reporter's "dictionary" to carry out the translation. The transcript initially produced through the computer may not be 100% accurate, but the reporter (or "scopist" who assists the reporter) can quickly make any needed corrections.

Some court reporters have developed the capacity to provide what is called "realtime" reporting—i.e., virtually simultaneous production of a stenographic record, capable of being shown on a screen as it is being recorded by the reporter. While useful in many contexts, realtime reporting is not essential for appellate case processing. However, the ability to produce a usable typed transcript very rapidly through the CAT technology should make it possible to prepare a complete record, including the transcript, very quickly. With the transcript and other portions of the record available in a matter of days (hours if there is urgency), the record can be filed promptly with the appellate court, and appellate lawyers can begin working on the appeal.

Although the potential of the CAT technology has been known for over twenty years, appellate courts have taken little advantage of it. As the data in Part II demonstrate, preparation and filing of the record is a very time-consuming process in the intermediate appellate courts that participated in this project. Part of the problem in most jurisdictions is that the court reporters work in and for the trial court, and the IACs appear to have little control over the speed with which the transcripts are produced. The problem is more one of system management than of technology. Although numerous observers have called for appellate courts to have and to exercise authority over preparation of the record (including the transcript),⁴¹ these recommendations have thus far gone largely unheeded.

In many states, because of their lack of direct authority over the court reporters, it may not be possible for the intermediate appellate courts to do much by themselves to take advantage of the potential that CAT holds for rapid transcript production. Clearly, however, there are strong public and justice system interests in taking advantage of technologies that can greatly speed the appellate process with no diminution in the quality of the work product. The

GUIDEBOOK TO COMPUTER-AIDED TRANSCRIPTION, at x-xi (1977).

40. See, e.g., WILLIAM E. HEWITT & JILL BERMAN LEVY, *COMPUTER-AIDED TRANSCRIPTION: CURRENT TECHNOLOGY AND COURT APPLICATIONS* 21-23 (1994).

41. See, e.g., CARRINGTON ET AL., *supra* note 37, at 63.

development of policies designed to ensure that transcripts needed for appeals are produced rapidly is a process that is likely to involve many different groups and individuals. The process is one in which state judicial leaders (e.g., chief justice, supreme court, and state court administrator), as well as judges in the intermediate appellate courts, bar leaders, trial court judges and administrators, state legislators, and court reporters, can and should play constructive roles.

Additionally, policies will need to be developed to take into account the potential for linking rapid transcript production to the availability of video records of trial court proceedings. As more trial courts use video recording of trial proceedings, appellate courts may expect parties to be able to present videos of important trial segments, including their presentation at “oral” argument accompanied by related CAT-prepared transcript displayed on an adjacent screen.⁴²

B. Electronic Filing of Records and Briefs

The trial transcript is an important component of the record on appeal, but it is by no means the only component. The “clerk’s record” typically also includes at least an index to the record, a chronological listing of all of the events in the trial court, the pleadings of the parties, and any written decisions prepared by the trial judge. It may also include motion papers filed in the trial court, exhibits admitted or offered for admission into evidence, and other documents.

Typically, the preparation of the record is done by staff in the trial court clerk’s office. The clerk’s office bundles either the original papers or a copy of them, plus the transcript, in a file jacket or box and mails the package to the appellate court clerk. The process is time-consuming, labor intensive, and requires substantial mailing and storage costs. As Philip Talmadge has noted, the implications of paper records for the work of appellate judges and their law clerks or staff attorneys are significant:

No two appellate judges can work on the same case file simultaneously unless the court has reproduced the whole record for each judge, an expensive proposition. Moreover, for a voluminous record, the judge and his or her staff do not have the luxury of keyword searches through the record. Judicial personnel must rely on laborious treks through the record, relieved only by the sketchy indices prepared by trial court staffs and court reporters.⁴³

42. This process has been under development at Courtroom 21 at the College of William & Mary Law School in Williamsburg, Virginia, where Project Consultant Prof. Fredric Lederer demonstrated it during a site visit in 1998. It should be noted that developments of this kind present appellate courts with far more searching questions about the entire process. For example, when video recording and transcript of actual trials may be viewed in the appellate courtroom or in chambers, what will be the impact on the traditional appellate deference to finders of fact regarding issues of credibility?

43. Talmadge, *supra* note 36, at 367.

Increasingly, trial courts are using some form of electronic record keeping, and there are strong indications that this trend will continue to accelerate. Some appellate courts have begun accepting electronically filed records and briefs, but none of the appellate courts in this project is systematically using e-filing technology to produce more efficient case processing.

Electronic filing of trial court records in the appellate court is clearly feasible when the trial court record itself is in electronic format. The use of electronic records can contribute to more expeditious case processing and improved appellate decision-making in several ways. These include:

- very rapid transmission of the record from the trial court, and of the transcript from the court reporter, to the appellate court;
- much broader and easier access to the record by appellate judges, law clerks, and staff attorneys—instead of being limited to access to a single paper file, any judge or clerk can have access to the record at any time for purposes of research; and
- enhanced capacity for appellate judges and those who assist them to search the record rapidly for key pieces of testimony or exhibits, using browser and keyword search technology.

Electronic filing of briefs is feasible and is now coming into use in some appellate courts. E-filing of briefs saves time, printing costs, and mailing costs. It provides the court and opposing counsel with briefs that can either be read online or printed out in traditional format. Of particular relevance for the future, when both the record and the briefs are in electronic format it is possible to create hyperlinks between a brief and the portion of the record that is referenced in the brief. Similarly, it should be possible to move easily between an electronic brief and a case cited in the brief that is accessible through one of the widely used electronic research services.⁴⁴

The advantages to an appellate court of having briefs and records in an electronic format are probably greatest in cases where the trial was lengthy and paper records would be bulky and difficult to access. However, even in relatively simple cases there should be gains in the efficiency of opinion preparation from the virtually instantaneous linkages among briefs, records, and prior appellate decisions that may be relevant precedents.

C. Videoconferencing

Videoconferencing—using video transmission to enable persons located in different places to communicate by viewing each other on monitors while they are speaking with each other—is another technology that has existed for some time but is now becoming less expensive and more practical. Several appellate courts have begun to put into place the equipment needed to allow persons to

44. For discussion of how one appellate court used electronic filing technology—in this case, “CD-ROMs containing the briefs, clerk’s papers, trial exhibits, appendices, and transcripts”—for a complex case that involved a paper record stored in approximately fifty banker’s boxes, see Talmadge, *supra* note 36, at 368, 370.

participate in court sessions or meetings through this process. For example, the Supreme Court of Georgia now has video cameras in its courtroom in Atlanta and monitors at each judge's seat on the bench. Using the videoconferencing technology, it is possible for lawyers from a distant part of the state to present oral argument without having to travel to the central courthouse.

The increasing availability and decreasing costs of videoconferencing should make this technology particularly attractive to appellate courts that have jurisdiction over large geographic areas and to many of the lawyers who handle appeals in those courts. Instead of having the lawyers travel to the court (or alternatively transporting the judges and staff to a distant location), the court and the lawyers can conduct oral argument on an appeal or motion via videoconference.

Technologically, it is not even essential for all of the judges to be in the same location. Judges who are not at the central courthouse can participate in the oral argument via video links. Subsequently, they can confer via videoconference with their colleagues on a panel concerning the decision and opinion.

For purposes of appellate caseload management, the principal potential advantage of videoconferencing is increased flexibility in scheduling oral arguments before a panel and in conducting conferences among the judges. There is so far no evidence that videoconferencing will really reduce delays, but there has not yet been any extensive use of this technology. There is at least the prospect that, in addition to reducing travel costs, videoconferencing can save time for judges and staff to use for research and other activities that will help bring cases to resolution expeditiously.

D. Computer-Based Issue Tracking

Computers, programmed with appropriate qualitative analysis software, can be used to help appellate courts identify cases that involve fact patterns and legal issues that are identical or closely similar to ones in cases previously decided by the court; or similar to the fact patterns and legal issues in other cases currently pending in the court.

In cases where the fact patterns and legal issues are closely similar to those in a case or set of cases previously decided by the court, there is ordinarily no reason for an intermediate appellate court to depart from previously existing caselaw. Unless one party presents persuasive reasons for reconsideration of the prior ruling, it should be possible to resolve the issues (and often the entire case) very quickly.

Sometimes multiple cases involving the same or closely similar fact patterns and legal issues reach an appellate court at approximately the same time. In these circumstances, computer-based issue tracking can enable the court to identify the cases and group them together for consideration by a single panel. Such grouping or clustering of cases enables the judges on the panel to gain the benefit of oral presentations and briefs written by several different lawyers and can give them a sense of the range of fact patterns that can be affected by decisions in the cases. Often the cases can be resolved by issuance of an opinion in a lead case. That opinion can then be applied to the remaining cases that have basically

similar fact patterns and legal issues, and these can be decided in a summary fashion. This approach enables appellate courts to make more efficient use of judicial resources and reduces the likelihood of inconsistent decisions by different panels.

E. Computer-Based Management Information Systems

In their 1990 study of case processing in four intermediate appellate courts, Chapper and Hanson noted that the courts they studied had generally done a mediocre or poor job of organizing information systems to provide information upon which appropriate management decisions concerning case processing could be based.⁴⁵ The effective design and use of information systems by appellate courts clearly remains an important issue for these intermediate appellate courts a decade later.

Good information about the details of individual cases and about overall caseloads is essential both for case-level decision-making at every stage of the appellate process and for management of the total business of the appellate court. Information about individual cases—for example, the date of the trial verdict or other lower court decision, the date the notice of appeal was filed, the nature of the case, the parties involved, the lawyers, the issues raised, and the length of the record in the court below—enables the appellate court to make decisions about whether the case is likely to be appropriate for accelerated disposition and whether it should be clustered with other cases for resolution by a single panel. Case-specific information is also needed for scheduling cases for argument, assigning cases to panels, and notifying the attorneys (or pro se litigants) about the dates for completion of briefing and oral argument.

Chief judges, clerks of appellate courts, and chief staff attorneys have responsibility for overall caseloads (or, in some circumstances, for major segments of caseloads), and thus need aggregate data on cases and caseloads, organized in a useful fashion. It is our sense that much of the data needed for effective caseflow management is currently stored in the automated information systems of most appellate courts, but the information is not made available to court leaders in a useful and usable form; and/or available but simply not used for monitoring, analysis, problem identification, and planning purposes.

Computer-based management information systems can be enormously valuable in storing data needed for individual case decision-making and for overall caseflow management. These information systems cannot, of course, manage caseloads by themselves. They can, however, be designed to produce management information reports that can be used by appellate court leaders to monitor the performance of the court in relation to performance goals and to identify problems that may arise in any stage of the appellate process. Based upon such information, chief judges and other leaders can take steps to address the problems and design effective caseflow systems.⁴⁶

45. See CHAPPER & HANSON, *supra* note 2, at vii-viii, 61-62.

46. Computer-based management information systems and several of the other technologies

IV. COMPONENTS OF EFFECTIVE APPELLATE CASEFLOW MANAGEMENT

Researchers studying appellate case processing have argued that concepts and principles of caseload management developed through experience in trial courts have direct relevance to appellate case processing. This Part draws upon information acquired in the course of our study of six intermediate appellate courts, together with insights from earlier research in both trial and appellate courts, in seeking to develop a framework for future work on improving caseload in appellate courts.

A. The Importance of Adequate Resources

Researchers who previously studied appellate case processing have come to somewhat differing conclusions about the importance of resources for appellate caseload management. Martin and Prescott, who conducted a study of volume and delay in ten appellate courts, reported in 1981 that as the number of filings per judge increased there was “a moderate to strong tendency for case processing time . . . to *decrease*.”⁴⁷ They did not, however, examine the number of filings in relation to total judicial resources available (i.e., including law clerks, staff attorneys, and judicial officers such as magistrates, in addition to judges) in conducting their study.

Roger Hanson, examining data on 1993 case processing times in thirty-five intermediate appellate courts supplemented by results from a survey of judges and court staff members in those courts, concluded that the principal factor influencing timeliness is resources—specifically, the number of judges and law clerks in relation to the number of filings.⁴⁸ While acknowledging that “[b]asic principles of modern management did appear to encourage timeliness,”⁴⁹ he argued that resources are the key determinant of expeditious appellate case processing.

Due to the lack of comparable measures of case processing times in all of the six courts in this study, it is not possible to draw any firm conclusions about the relative importance of resources vis-à-vis management in influencing the expediency with which the courts resolve cases. Of the six courts in this study, the fastest—the Maryland Court of Appeals—has slightly more resources (i.e., judges and the combination of judges, other judicial officers, law clerks, and staff attorneys) in relation to total filings than do four of the other courts. However, the differences are not great. Other factors are clearly at work. In seeking to develop knowledge about other factors that may be relevant, it is useful to examine what has been learned through the study of trial courts. While appellate courts differ significantly from trial courts, many of the basic caseload problems

discussed in this Part are examined in greater detail in Appendix A, which also includes more specific description of some of the processes involved.

47. MARTIN & PRESCOTT, *supra* note 8, at 37 (emphasis in original).

48. See Hanson, *supra* note 20, at 43.

49. *Id.* at 35.

and issues—and, potentially at least, the components of a general strategy for reducing delays and managing caseloads effectively—are likely to be similar.

B. Key Elements of Sound Appellate Caseflow Management

One of the particularly useful insights in Martin and Prescott's 1981 study of appellate case processing was that different perspectives on the causes of appellate caseflow problems are likely to lead to different responses. Martin and Prescott observed that approaches developed in response to a perspective that emphasizes the importance of *case volume* as the principal determinant of delay typically involve either adding resources; or restructuring existing resources, generally by selecting categories of cases for different types of consideration.⁵⁰

The alternative perspective identified by Martin and Prescott is one that emphasizes *processing and management inefficiencies* as the primary determinants of delay. The programmatic approaches developed in response to this perspective recognize that volume is a factor, but they tend to address processing time directly by seeking to increase productivity—typically by introducing new technologies or by adopting procedural changes aimed at streamlining some stages of the appellate process.⁵¹

The components of caseflow management outlined here encompass both general categories of approaches. This perspective recognizes the need for adequate resources but focuses particularly on how the resources are used. The primary emphasis is on what, specifically, appellate courts and others who are involved in (or have stakes in) effective appellate caseflow can do to improve system operations.

One of the striking findings from empirical research on caseflow management and delay reduction at the trial court level is that there is no one single model of a successful delay reduction program or caseflow management system.⁵² Successful trial courts have had varying levels of available resources, are organized in many different ways, use a variety of different procedures and case assignment systems, and differ considerably in the extent to which they use modern computer technology. Despite these differences, however, successful trial courts share some common characteristics. Perhaps most importantly, successful courts and programs are relatively comprehensive. Rather than seeking a "one-injection miracle cure," jurisdictions that have succeeded at caseflow management at the trial court level have incorporated a number of different components into their systems and have refined and maintained the systems through hard work.⁵³

50. MARTIN & PRESCOTT, *supra* note 8, at 7-9.

51. *Id.*

52. See, e.g., DAVID C. STEELMAN ET AL., CASEFLOW MANAGEMENT: THE HEART OF COURT MANAGEMENT IN THE NEW MILLENNIUM 87 (2000); Barry Mahoney & Dale Anne Sipes, *Toward Better Management of Criminal Litigation*, 72 JUDICATURE 29, 35 (1988).

53. BARRY MAHONEY ET AL., CHANGING TIMES IN TRIAL COURTS 197 (1988); see also Maurice Rosenberg, *Court Congestion: Status, Causes, and Proposed Remedies*, in THE COURTS,

It is at least a reasonable hypothesis that the same generic elements that have been found to be important for effective case processing in trial courts are also likely to be important for effective case processing at the appellate court level. This section of the report discusses the operations of intermediate appellate courts in light of the same ten key elements of effective caseflow management in trial courts that successfully reduce or prevent delays.⁵⁴

1. *Leadership*.—In studies of corporate innovation and excellence, as well as of courts and criminal justice agencies that succeed in attaining significant goals, leadership emerges as a critically important factor. In their classic study of excellence in the corporate world, for example, Peters and Waterman found that “associated with almost every excellent company was a strong leader (or two) who seemed to have had a lot to do with making the company excellent in the first place.”⁵⁵ Similarly, when practitioners in successful trial courts were asked about reasons for the court’s effectiveness, “one of the most frequent responses was a reference to the leadership ability of the chief judge.”⁵⁶ The specific leadership qualities mentioned in this context varied, but generally included reference to the chief judge’s “vision, persistence, personality,” and leadership skills.⁵⁷

In the concluding chapter of their 1990 study of four intermediate appellate courts, Chapper and Hanson noted that the relative merits of having a permanent chief judge as opposed to a rotation system (with chief or presiding judges serving terms of only one or two years) could not be established by their research.⁵⁸ They observed, however, that there is at least one clear advantage to having a permanent chief judge: he or she can provide a focus and continuity for policy development and implementation.⁵⁹

Of the six courts participating in this study, only one—the Maryland Court of Special Appeals—has a permanent chief judge. While not conclusive on the relative merits of permanency (or long tenure), it is worth noting that the Maryland court is relatively speedy, and the chief judges of the court have been consistent in emphasizing expeditiousness.⁶⁰ The principal procedural innovation

THE PUBLIC, AND THE LAW EXPLOSION 29, 55 (Harry W Jones ed., 1965). On the basis of the evidence available in 1965, Rosenberg was emphatic in rejecting the notion of a “one-injection miracle cure” for problems of court backlogs and delays. He noted that only a few of the “delay antidotes” that had been developed during the 1950s and early ‘60s had worked to even a modest extent and that some had been counter-productive. Rosenberg’s observation that “progress in coping with the old problem of court delay will have to come from marshaling relief measures in groups” has proven to be accurate. *Id.* at 55.

54. The analytical framework is adopted principally from the concluding chapter of MAHONEY ET AL., *supra* note 53, at 197-205.

55. THOMAS J. PETERS & ROBERT H. WATERMAN, JR., IN SEARCH OF EXCELLENCE 26 (1982).

56. MAHONEY ET AL., *supra* note 53, at 198.

57. *Id.*

58. CHAPPER & HANSON, *supra* note 2, at 58.

59. *Id.*

60. For a discussion of the role of the chief judge of the Maryland Court of Appeals, see *id.*

that many regard as key to its relative speed is one that was introduced by a former long-serving chief judge and kept in place after his departure: a calendaring rule that sets each newly filed case for argument or submission during a specific month at the time the record is filed.

According to Chapper and Hanson, “[h]aving a permanent chief or presiding judge will not ensure the successful adoption and introduction of procedural changes, but it can ensure the continuity of leadership and commitment that is required where a permanent modification of established practices and behavior is involved.”⁶¹ While there are certainly risks in providing for a permanent chief (or one with a lengthy term), it seems likely that a longer term enables a chief judge to acquire in-depth knowledge about the caseload problems faced by an appellate court, provides time to marshal the needed resources, and makes it possible to persist in initiating and implementing needed innovations.

2. *Goals*.—Meaningful goals are integral to effective caseload management systems.⁶² In the absence of clear goals, practitioners—lawyers, court staff, and judges—have no way of knowing what is an appropriate maximum period of time for the stages of a case and no way of measuring their own (or the court’s) effectiveness in managing their caseloads.

Nationally, the best-known time standards are those incorporated in the American Bar Association’s *Standards Relating to Appellate Courts*. Originally adopted in 1976, the ABA time standards have been modified (most recently in 1994) to make them less stringent than the original standards. The current version of the ABA standards calls for seventy-five percent of all appeals to be resolved within 290 days and ninety-five percent to be resolved within one year.⁶³ Some state appellate courts—including at least four of the courts in this study—have adopted some type of time standards. The standards themselves vary considerably and, importantly, sometimes do not address stages of the appellate process prior to submission or argument.

Of the six courts in this study, the time standards for the two Ohio courts were set by that state’s supreme court: generally, with a few exceptions, cases are to be disposed of within 210 days.⁶⁴ This is a more ambitious goal than those set by the ABA’s standards, but the Ohio Tenth District Court of Appeals

at 93, 98.

61. *Id.* at 58.

62. The ABA Standards cite the lack of clear goals as a significant cause of delay. See JUDICIAL ADMIN. DIV., AM. BAR ASS’N, *supra* note 22, § 3.50 and accompanying commentary; see also RITA M. NOVAK & DOUGLAS K. SOMERLOT, *DELAY ON APPEAL* (1990).

63. JUDICIAL ADMIN. DIV., AM. BAR ASS’N, *supra* note 22, § 3.52(d). It should be noted that the time frames in this section are specifically described as “reference models” to which appellate courts should accord serious consideration when formulating time standards for themselves. For a discussion of the history of these standards, see *id.* § 3.52(d) cmt.; see also Carl West Anderson, *An Appeal for Practical Appellate Reform*, 37 JUDGES’ J. 28, 29-31 (1998).

64. OH. SUP. R. 39(A) (Anderson 2001). “The time limits for disposition of appellate and civil cases shall be as indicated on the Supreme Court report forms.” *Id.* The report forms, copies of which are in the authors’ files, incorporate this 210 day standard.

appears to meet the ABA standards and comes close to satisfying those set by the Ohio Supreme Court. Division I of the Washington Court of Appeals began its current effort to reduce the lengthy time from filing to decision by aiming to decrease that time period to eighteen months over an eighteen-month campaign.⁶⁵

The New Mexico Court of Appeals established time standards in 1999 and recently readopted them. The goals are to dispose of fifty percent of all cases within 180 days (six months) of the filing of the appeal, seventy-five percent within 365 days (one year), ninety-five percent within 540 days (eighteen months), and the remaining five percent as expeditiously as possible in consideration of the length of the record and complexity of issues. For each judge, the goal is to file an opinion in fifty percent of the cases assigned within ninety days (three months) of submission, seventy-five percent within 150 days (five months), ninety-five percent within 300 days (ten months) and the remaining five percent as expeditiously as possible.⁶⁶

3. *Information.*—Appellate court leaders who are seriously interested in improving caseload management in their courts will place a high premium on ensuring that timely and accurate information is available, both for case-level decision-making and for overall caseload management.

Case-level information is needed at every stage of the process. At the initial filing in the appellate court, for example, it can be enormously valuable for the court to gain immediate knowledge about the nature of the case, the issues on appeal, and the length of the trial record, as well as accurate information about the identity of the trial judge, the court reporter, and the parties and lawyers involved. Such information enables the appellate court to make early decisions about putting the case on a particular “track” (such as the type of summary calendar used for accelerated disposition of cases in the New Mexico Court of Appeals) and provides information needed to monitor completion of the record and briefing stages of the process.

Aggregate data on the court’s total caseload and on the court’s effectiveness in handling all of the major segments of its caseload is needed by court leaders to monitor performance, identify problems, and develop plans for addressing the problems. Unfortunately, one of the key conclusions of Chapper and Hanson’s 1990 study of four IACs remains accurate today: “The unavailability of information on caseload composition, attrition rates, and case processing time inhibits clear problem identification and choice of promising solutions.”⁶⁷

Four types of aggregate information are especially important for management of an appellate court’s overall caseload and its caseload process:

a. *Information on pending caseloads.*—Operationally, information on pending cases is of great importance in assessing the effectiveness of an appellate court’s caseload management system. Good information on pending caseloads

65. This initiative was discussed by the then-civil judge at a meeting with one of the authors in 1998.

66. NEW MEXICO COURT OF APPEALS’ POLICIES AND PROCEDURES MANUAL §§ IV(2)&(3) (2001).

67. CHAPPER & HANSON, *supra* note 2, at vii.

provides a picture of the current workload of the court organized by major case type (e.g., civil appeal or criminal appeal) and, within each case type, by age and case status. It also indicates how many cases (and which ones) are exceeding the court's time standards and makes it possible to flag cases that need attention.

If the court has a backlog problem, the pending caseload information should show the dimensions of the problem and enable court leaders to develop plans to address it. Pending caseload data is relevant to each stage of the appellate process and is obviously most useful when the court has standards that address the time appropriate for each stage. With information about the number of cases pending over the time standard and the ability to identify which ones are "too old," court leaders can initiate action to get the judge or attorney responsible for completing this stage of the appellate process to do the needed work.

b. Information on the age of disposed cases.—By definition, information on cases that have reached disposition is historical information. It can, however, be extremely valuable for purposes of appellate caseload management for two main reasons:

- It enables an assessment of the court's recent performance with its own time standards, with national time standards, with the performance of other courts that have similar caseloads, and with its own prior performance.
- When broken down by case type, the nature of the disposition, and stage of the process at which disposition occurs, it can be very valuable in the diagnosis of caseload problems and the design of workable solutions. For example, this type of information can be the basis for construction of a "fall-out chart" that shows the time required for different types of cases and the stage of the process at which disposition occurs. It should then be possible to identify patterns with respect to the types of cases that tend to fall out early, that are handled summarily, and that tend to go to full opinion. With such information in hand, appellate courts can develop "differential case management (DCM)" systems that make more effective use of limited resources.⁶⁸

As with pending caseload information, it is important to be able to break information on the age of cases at disposition into relevant categories and sub-categories in order to use it effectively. With such information it is possible, for example, to identify particular categories of cases that take extraordinarily long periods of time in some stages of the process. It is then possible to ask why certain categories of cases take much longer than seems necessary or appropriate. Asking and answering these types of questions is a critical first step in developing strategies to reduce or minimize delays.

c. Information on continuance practices.—One measure of the effectiveness of a court's caseload management system, at both the trial and appellate levels, is the percentage of events that take place on the date scheduled. In appellate

68. For a discussion of the concept and techniques of differentiated case management, see JUDICIAL ADMIN. DIV., AM. BAR ASS'N, *supra* note 22, § 3.50 and accompanying commentary; see also STEELMAN ET AL., *supra* note 52, at 5-8; Holly Bakke & Maureen Solomon, *Case Differentiation: An Approach to Individualized Case Management*, 73 JUDICATURE 17 (1989).

courts, key dates include those set by statute or rule for the filing of records and briefs, and logically could also include dates set for oral argument or for completion of an assigned opinion by a judge. Information needed to calculate continuance rates (and to ascertain the length of extensions of time when continuances are granted) should be readily obtained from court records.

d. Trend data on filings and dispositions.—Information on annual filings and dispositions is relatively easy to collect and report and is commonly available for all appellate courts. This information provides a rough picture of the court's overall workload and an indication (by comparing dispositions with filings) of whether the court is keeping up with its workload. Data on filings and dispositions can be more useful, however, when it is broken down into major categories and sub-categories of case types and types of dispositions; and it is available over a long period of time. Having such data for an extended period of time enables analysis of trends in the court's workload and productivity. It can be helpful in identifying changes in the workload and in decisional practices, in assessing whether the court is gaining or losing ground, and in serving as a starting point in developing plans for improvements.

4. *Communication.*—One of the clear lessons from research and experimentation on court and justice system operations is that "good communications and broad consultation . . . are essential if a program is to succeed."⁶⁹ In the case of appellate courts, good communications within the court are especially important because of the collegial nature of an appellate court, the need to develop agreement among at least a majority of the judges on a panel for decisions in cases, the need for support from at least a majority of the full bench for major changes in policy and practice, and the key roles played by staff in the clerk's office and by central staff attorneys and law clerks in the day-to-day work of the court. Good communications with those outside the court—especially the practicing bar (at least those who are engaged in appellate practice, including those who head the appellate sections of major institutional litigants such as an attorney general's office), trial judges, and trial court clerks and court reporters—are also important.

Because the appellate process is not entirely under the control of the appellate court, the cooperation of those outside the court is essential for significant improvements to be made. It is appropriate for leadership to come from within the appellate court. However, in order to identify problems and develop workable solutions, it will be necessary to have the active involvement of those responsible for each of what have sometimes been called the three basic functions of appellate courts: the administrative function (record preparation, including production of the transcript); the lawyer function (briefing and presentation of oral argument); and the judicial function (decisionmaking, including the processes of hearing oral argument and preparing opinions).⁷⁰

69. MAHONEY ET AL., *supra* note 53, at 200-01; *see also* NOVAK & SOMERLOT, *supra* note 62, at 17-18, 139.

70. *See, e.g.,* Carl West Anderson, *Are the American Bar Association's Time Standards Relevant for California Courts of Appeal?*, 27 U.S.F. L. REV. 301 (1993).

The need for good communication goes beyond those who are directly involved in the appellate process. Good communication with state judicial leaders (particularly the chief justice, state supreme court, and state court administrator's office) is important in addressing issues that are beyond the immediate control of the IAC (such as budgetary issues). Similarly, it is important to cultivate good communication with the legislature, which ultimately holds the purse strings for the courts and can shape the nature of the court's caseload and many of the procedures it follows.

5. *Caseflow Management Policies and Procedures*.—As Chapper and Hanson noted in 1990, “[t]he principles of case management distilled from trial court experience have clear parallels in appellate case processing.”⁷¹ Indeed, the first edition and every subsequent edition of the *ABA Standards Relating to Appellate Courts* has included sections on caseflow management. The primary concept, expressed as a “general principle” in the ABA Standards, is that “[a]n appellate court should supervise and control the preparation and presentation of all appeals coming before it.”⁷² Caseflow management policies and procedures that flow from this principle are listed below.

a. *Appellate court supervision of the record preparation stage*.—

- a requirement that the appellate court receive notice of an appeal being taken at or before the time the notice of appeal is filed in the trial court;
- prompt filing with the appellate court of a docketing statement or other statement providing basic information about the appeal, including: the caption; the file number in the trial court; the name of the trial judge; the names, addresses, and phone numbers of the attorneys (and of the parties if one or more is self-represented); the nature of the case; the result in the trial court; the issues on appeal; the length of the trial (and/or approximate length of the trial transcript); and any reasons why the case should be placed on a track for accelerated consideration or other special handling;
- a requirement that appellate counsel file their designations of record with both the trial court and the appellate court;
- provision for rapid resolution of any issues concerning appellate court filing fees, eligibility for counsel, or proper contents of the record on appeal;
- procedures enabling prompt appointment of appellate counsel for indigent defendants in criminal cases;
- a requirement that counsel order the transcript from the court reporter within a short period following the filing of the notice of appeal;
- provision for the use of a court reporting technology that is capable of producing a trial transcript within no more than seven days after the conclusion of a trial. (Note that this technology could be either a court reporter using computer-aided transcription or another technology that has been shown to be capable of routinely producing a record that is

71. CHAPPER & HANSON, *supra* note 2, at vii.

72. JUDICIAL ADMIN. DIV. AM. BAR ASS'N, *supra* note 22, § 3.50.

accurate and easily usable—by the parties, their lawyers, and the appellate court’s judges, law clerks, and staff attorneys—within a short time frame);

- establishment of a court rule prescribing short periods of time for the production of trial transcripts after the date they are ordered by the counsel for the appellant, with a requirement that the ordering statement be filed with both the trial court and the appellate court;
- provision for prompt payment of court reporters who produce transcripts for indigent appellants in criminal cases;
- use of electronic transmission of all or major portions of the record from the trial court and/or the court reporter to the appellate court whenever possible;
- use of computer-based management information reports to enable monitoring of compliance with time standards, court rules, and policies concerning prompt preparation of the record; and
- designation of an appellate court judge and/or senior staff person to monitor compliance with record preparation procedures and time requirements, identify problems, and develop workable solutions to improve record preparation.

b. Appellate court scheduling of cases and monitoring of the briefing process.—

- use of a docketing statement and/or other information furnished to the court at the initiation of the appeal, to assign the case to an appropriate track for briefing and submission, consistent with the complexity of the case and the nature of the issues presented by the appeal;
- issuance of a briefing schedule not later than the time the record is filed (may be done earlier if the docketing statement shows reason for an accelerated schedule);
- monitoring and enforcement of schedules set for the submission of briefs, with recognition that there may sometimes need to be short extensions of time for good cause shown;
- provision for submission of briefs prepared using up-to-date word processing or publishing software; elimination of requirements for printed briefs;
- use of electronically filed briefs when feasible;⁷³
- calendaring of cases for argument or submission done not later than the date the appellant’s brief is filed (may be done sooner if information in the docketing statement indicates that the case is appropriate for accelerated consideration);
- policy of setting cases for argument or submission after the appellant’s brief is filed and within a short time (e.g., within one month) after the

73. The U.S. Securities and Exchange Commission now requires many documents to be filed electronically on its EDGAR (Electronic Data Gathering, Analysis, and Retrieval) system unless a hardship claim is made. Filing can include submission of a diskette as well as dial-up or Internet filing.

- date the appellee's main brief is due;
 - use of computer-based management information reports to enable monitoring of attorneys' compliance with briefing schedules;
 - use of reminder notices and, if necessary, appropriate sanctions for non-compliance with briefing schedules; and
 - designation of an IAC judge and/or senior staff person to monitor compliance with briefing schedules, identify problems, and work with attorneys to develop effective systemic solutions.
- c. *Appellate court decision-making and opinion preparation.*—
- organization of the appellate court to enable speedy decisions on motions;
 - organization of the appellate court to enable optimum allocation of judicial and non-judicial resources available to conduct legal research and preparation of decision memoranda and opinions;
 - assignment of responsibility to a panel of presiding judges for production of opinions (including any dissents) within an acceptable period of time following argument or submission of cases, consistent with time standards adopted by the court;
 - use of computer-based management information reports to monitor the effectiveness of judges (and others, where appropriate) in meeting the court's time standards for completion of the decision/opinion preparation process;
 - regular meetings of the judges at which reports on the effectiveness of the court and of individual judges in meeting time standards and other performance goals are discussed, problems are identified and plans are developed for appropriate action to address the problems; and
 - leadership by the chief judge in emphasizing the commitment to expeditious resolution of appeals.

Most of the caseload management policies and procedures listed immediately above have been recommended by others;⁷⁴ there is little that is new in the list aside from some of the items relating to use of modern technology (e.g., electronic filing of briefs and records). Some of these mechanisms are in place in some of the courts involved in this project. What is not in place in any of these six courts, however, is a comprehensive set of policies and procedures that ensures effective goal-oriented supervision of all stages of the appellate process by the IAC.

6. *Judicial Responsibility and Commitment.*—"The effort has to come from the court itself, the judges deciding the appeals. They are the ones who have it within their power to effect the necessary changes."⁷⁵ This observation, from a thoughtful lawyer who was the presiding judge of a busy intermediate appellate court for over a decade, gets to the heart of the challenge confronting those who

74. See, e.g., CARRINGTON ET AL., *supra* note 37, 225-31; JUDICIAL ADMIN. DIV. AM. BAR ASS'N, *supra* note 22, §§ 3.50-.51 and accompanying commentary; NOVAK & SOMERLOT, *supra* note 62.

75. Anderson, *supra* note 63, at 64-65.

press for a more expeditious appellate process. If appellate courts are going to introduce significant innovations, the changes must be acceptable to—and have the support of—a critical mass of the court. The history of the Ohio Eighth District, as originally documented by Martin and Prescott, shows how a court can decide to change its culture to one promoting expeditious decision making.⁷⁶ In the same vein, the recent action of the Washington courts in setting goals to reduce what were very lengthy time periods from filing to decision also demonstrates the significance of the judges of a court deciding as a group to confront this challenge.

It is also clear that continued acceptance of judicial responsibility and consequent commitment to speedy processing of appellate cases must become integral to a court's culture. The experience of the Maryland Court of Special Appeals confirms the accuracy of this axiom. A former chief judge urged the court to take on this challenge; the current chief judge expends great effort in performing key functions such as screening cases to make sure that the court keeps pace with its caseload, and the other active judges participate in the process by focusing on resolving cases expeditiously. The emphasis on prompt disposition of appeals has become a part of the culture of the Maryland court. As one judge put it recently in an interview with one of the authors, "this is the way we do it."

7. *Staff Involvement*.—One of the most significant trends during the past two decades has been the development of professional administrative and staff support in state intermediate appellate courts.⁷⁷ Court administrators, clerks of court, and chief staff attorneys play increasingly vital roles in the leadership and management of appellate courts. Most IACs now have a significant complement of central staff attorneys in addition to the judges' own clerks.⁷⁸ Additionally, some IACs use judicial officers who are not full-fledged judges—for example the commissioners in the two Washington courts and the appellate magistrates in the Ohio Tenth District—to handle some categories of cases or some stages of some appellate proceedings.⁷⁹

Appellate courts have organized the use of non-judge resources in different

76. John A. Martin & Elizabeth A. Prescott, *VOLUME AND DELAY IN THE OHIO COURT OF APPEALS, EIGHTH DISTRICT* (1980).

77. See Joseph R. Weisberger, *A Profile of Appellate Staff: A Survey*, 24 JUDGES' J. 31 (1985).

78. The growth of staff resources has paralleled the growth in volume in appellate courts in the past three decades. One of the strategies recommended by those concerned about appellate justice in the 1970s was the development of a staff of attorneys who serve the court as a whole to assist in tasks such as screening newly filed cases, assigning cases to different "tracks," and preparing memoranda and proposal decisions on cases. See generally CARRINGTON ET AL., *supra* note 37, at 44-55; DANIEL J. MEADOR, *APPELLATE COURTS: STAFF AND PROCESS IN THE CRISIS OF VOLUME* (1974); NOVAK & SOMERLOT, *supra* note 62, at 115-16. ROGER A. HANSON ET AL., *THE WORK OF APPELLATE COURT LEGAL STAFF* (2000), contains extensive information regarding the varied ways in which these attorneys are now being used by their courts.

79. See discussion *supra* Part II.

ways. The New Mexico Court of Appeals, for example, has a larger central staff attorney complement than any of the other five courts in this study, but fewer law clerks per judge than any of the other courts.⁸⁰ The types of assignments given to central staff attorneys and to judges' law clerks vary across the courts. Little is known about the relative merits of different ways of organizing these resources, but it seems clear that they are important to the functioning of all of the courts. How they are used—in particular, how their functions are related to the performance goals of the courts—appears to be an important issue on which further research would be useful.

8. *Education and Training.*—If an appellate court is to manage its caseload successfully, both the judges and the court staff need to know what goals to strive for, why these goals are sought, what is expected of them individually, and how to perform their duties effectively. Educational programs on managing appellate caseloads have been offered sporadically by national organizations, but there has not been a sustained national effort. Three national membership organizations offer annual educational seminars that sometimes include sessions relating to appellate caseflow management—the Council of Chief Judges of Courts of Appeals, the National Conference of Appellate Court Clerks, and the Council of Appellate Staff Attorneys (all three receiving principal support for their educational programs from the American Bar Association's Appellate Judges Conference). However, many IACs (including the six in this study) have relied on in-state judicial conferences and other similar programs that rarely have focused on expeditious case processing as a core topic. The new database established by the Judicial Education Reference, Information and Technical Transfer (JERITT) Project, the national clearinghouse for information on continuing judicial branch education,⁸¹ appears to contain no references specifically on appellate caseflow management. Much of the progress that has been shown during the past decade dates to participation by several IACs in the ABA's appellate justice project (conducted in 1988-1990) that produced the *Delay on Appeal* volume.⁸²

9. *Mechanisms for Accountability.*—If appellate caseflow is to be managed, someone must be responsible for the management, and there must be clarity about what is expected from the person(s) with management responsibility. Accountability requires clear goals or standards by which to assess performance; information that can be used to monitor performance in relation to goals; an expectation that performance will in fact be monitored by someone in authority; and a sense that there will be some recognition of (and reward for) good performance and negative sanctions for poor performance.

The two Ohio courts have been operating in a landscape in which some

80. See discussion *supra* Part II; *infra* tbls.1, 2.

81. The database can be found at <http://jeritt.msu.edu> (last visited Jan. 28, 2002).

82. See Anderson, *supra* note 63 (discussing the key role played by the ABA's appellate justice project in stimulating successful delay reduction efforts). The work of the project is described in NOVAK & SOMERLOT, *supra* note 62.

degree of accountability has been established by the state's supreme court.⁸³ Those courts (and all of the other appellate and trial courts in Ohio) provide monthly reports to the supreme court on the extent to which they are in compliance with applicable case processing time standards. Additionally, the judges of the Ohio Tenth District have developed time guidelines for opinion drafting: thirty days for a simple case, sixty for a complicated one, and ninety for a truly complex appeal. A monthly report to all judges recaps all pending cases and contrasts the actual time to the judge's estimated time. The New Mexico Court of Appeals, as noted earlier, adopted standards for opinion completion.⁸⁴

Another form of accountability is provided by an ancient mechanism that has sometimes been perceived as a restrictive force in court administration—the term system. Perhaps the best known example of an appellate court deciding all pending cases by the end of its current Term is the U.S. Supreme Court. While neither that court's jurisdiction nor its use of terms is directly comparable to that of any other appellate court, the idea of completing work on all pending cases within a defined period retains currency. Many appellate judges, for example, remind law clerks hired for one year that they are expected to complete work on all cases assigned to them before the end of their term of employment. The Georgia Court of Appeals adheres strictly to a state constitutional requirement that every case be disposed of during the term for which it is entered on the court's docket for hearing. Dorothy Beasley, a former chief judge of that court, credits this policy with being “the most important factor,” in the Georgia Court of Appeals' relatively speedy pace of litigation.⁸⁵

10. *Backlog Reduction/Inventory Control*.—For an appellate court to improve its caseflow management, it often must first address the problem of an existing backlog—i.e., a large number of cases that have been pending for more than an acceptable period of time. Elimination of the backlog is just as important for a delay reduction program as is the development of effective means for dealing with newly filed cases.⁸⁶ Until the backlog of old cases is cleared away and substantially all cases are being resolved within the overall time standard adopted by the court, a court committed to effective caseflow management must dispose of appreciably more cases than it takes in.

To successfully address a backlog problem, temporary additional resources may be needed, not only in the court but in other organizations and agencies, especially if the backlog consists in significant part of cases that have been taking too long in the record preparation and/or briefing stages. These may include, for example, the trial courts (in connection with production of trial transcripts and

83. OH. SUP. R. 39(A) (Anderson 2001).

84. See *supra* Part I.B.2.

85. See Dorothy Toth Beasley et al., *Time on Appeal in State Intermediate Appellate Courts*, 37 JUDGES' J. 12, 17 (1998). The Georgia Court of Appeals was one of the most expeditious courts in Hanson's *Time on Appeal* study with a seventy-fifth percentile time of 297 days from notice of appeal to resolution. See HANSON, *supra* note 7, at 13-17 (tbl.1).

86. See, e.g., NOVAK & SOMERLOT, *supra* note 62, at 84-93; MAHONEY ET AL., *supra* note 53, at 204-05.

other portions of the records) and the institutional litigants, such as the offices of the attorney general, public defender, and district attorney, that handle a large volume of appeals. Planning a backlog reduction program thus requires a collaborative approach: appellate court leaders must work with the larger court system in the state (particularly if additional resources are likely to be required by the court for a short but sustained backlog reduction program) and with the trial courts, the institutional litigants, and bar leaders.

Where a court is already functioning well and delay is not a problem, control of the inventory of pending cases should still be a matter of concern. The notion of a “manageable caseload”—a pending caseload that can be dealt with by the court within applicable time standards—is operationally important. Management information—in particular, information on the size, age, and composition of the pending caseloads in each of the stages of the appellate process—is obviously a critical element here, but the requisite information should not be difficult to collect. Trend data is also very important because it provides the court with warning signs. If filings begin to exceed dispositions and the age of cases in the pending caseload starts to increase, the court should be prepared to take corrective action.

C. Reviewing Some Mechanisms That Have Produced Promising Results

While the ten key elements discussed in the previous section should provide a basis for any intermediate appellate court to proceed toward improving its ability to process its caseload expeditiously, this project and other efforts have produced valuable information about specific mechanisms that have worked in practice in some jurisdictions. (An extensive list of mechanisms is included in Appendix B.) Information about the mechanisms discussed in this section have been gleaned from interviews with practitioners in the six courts participating in the project and from other intermediate appellate courts through a focus group conducted at an annual educational seminar of the National Conference of Appellate Court Clerks; a roundtable discussion at the annual educational seminar of the Council of Chief Judges of Courts of Appeals; and a review of availability reports and other literature focused on specific courts.

1. Mechanisms for Shortening the Record Preparation Stage.—As noted in Part III, delays in the preparation and filing of the record are more a problem of system management than of technology. For the record preparation process to work quickly and smoothly, it is important for practitioners at both the trial court and the appellate court to know what is expected (and by when) and to have the resources needed to do the work. It is important for the appellate court to actively supervise the process, taking account of relevant time standards and working to solve problems that produce delays. Four mechanisms show particular promise for shortening the overall record preparation process.

a. Transcript coordinator.—In New Mexico, a managing court reporter in Bernalillo County (which includes Albuquerque, the state’s largest city) coordinates the use of court reporters and other mechanisms for making the record. Her duties include making certain that the proper transcript has been ordered and is being prepared expeditiously in each case in which an appeal is

taken.

b. Transcript oversight by court.—In Washington State, the appeals courts have taken responsibility for tracking backlog problems with specific reporters. In Maryland, staff in the Clerk's Office of the Court of Special Appeals will contact the reporter(s) who were supposed to produce the manuscript when transcripts have been ordered but not completed for lengthy periods. In California's First Appellate District, one superior court judge in each county has been designated to serve as the Appeals Supervising Judge and serves as the primary point of contact for the leaders of the courts of appeal with respect to transcript production delays and other problems in the preparation stage.⁸⁷

c. Rapid transcription of audio tapes.—In jurisdictions where the record of proceedings in the trial court is taken on audiotape instead of by a court reporter, a policy of having tapes immediately transcribed in any case in which a notice of appeal is filed may resolve otherwise lingering problems of inaudible or flawed tapes. Some states, of course, require that written transcripts be filed in every case, but the immediate transcription policy would be appropriate for courts that receive many appeals of cases with taped records.

d. Communication with trial court personnel.—The responsibility for filing the trial court record in the appellate court may fall on either the attorneys or the trial court clerk. The attorneys may be sanctioned by the appellate court for dilatory behavior. However, sanctions are probably best reserved for egregious delay. In the Court of Appeal for California's First Appellate District, one Presiding Judge found that conducting regular meetings of trial court clerks within the appellate court's jurisdictional area served to alert them to common problems connected with timely preparation of records and was helpful in resolving the problems and developing trust and cooperation.⁸⁸

2. Mechanisms for Minimizing Delays During the Briefing Stage.—Lawyers handling appellate cases often want—and in some cases genuinely need—more time to prepare their briefs than is provided for by applicable statutes and appellate court rules. However, while extensions of time may be warranted, appellate courts should follow sensible and consistent policies in considering requests for such extensions and in determining the amount of time allowed. In situations where the need for an extension is not a case-specific or one-time event, but rather is the product of systemic problems such as case overload in the office of an institutional litigant such as a prosecutor or public defender, the appellate court can play a constructive role in helping to address the underlying issues. Below are specific mechanisms some IACs are using to address each type of situation.

a. Policies for responding to requests for continuances or extensions of time.—This is probably the most common (and often most vexing) problem that intermediate appellate courts face during the briefing stage. The Ohio Tenth District Court of Appeals has delegated the authority to rule on motions for extension of time to its court administrator, who has made it clear that these

87. See Anderson, *supra* note 70, at 320-23.

88. *Id.* at 322-23, 357-58.

motions will only be granted for good cause. Good cause is narrowly defined. The court has found it more effective to shift these motions from the individual judges to the court administrator so as to expedite their decisions and establish a standard policy. Perhaps most critical to the success of this policy is the court's willingness to back the administrator when counsel challenge denial of extensions.

b. Addressing the compliance problems of institutional litigants.—Public legal offices, such as those of attorney-general, prosecutors, and public defenders, are frequently understaffed, especially in their appellate sections. While these offices possess advantages of expertise and familiarity with both the court and the law in litigating against practitioners who may only occasionally represent an appellate party, often the appellate sections are significantly understaffed, creating a real disadvantage. In Washington State, the appeals courts have started to work closely with these offices to prepare schedules for briefing that recognize the limited resources but also encourage the offices to mobilize their staffs and prioritize their cases more effectively.

3. *Mechanisms for Ensuring Prompt Completion of the Decision and Opinion Preparation Stage.*—The time between the completion of the briefing stage and the appellate court's issuance of a decision can be subdivided into two parts: the period prior to oral argument or submission; and the post-argument (or post-submission) period. Some courts have developed practical mechanisms for handling both stages effectively.

a. Prompt calendaring of cases for argument or submission.—IACs follow different practices with respect to the calendaring of cases. The approach used by the Maryland Court of Special Appeals has proven effective for that court: cases are set for argument or submission during a specific month shortly after the record is filed. The schedule is designed to leave adequate but not excessive time for preparation of briefs by the lawyers. Other approaches are to place the case on the calendar at the time the appellant's brief is filed; or at the time the appellee's brief is filed. The effectiveness of any of these approaches depends, of course, on the parties' abilities to complete the briefing process within the schedule set by the court; and the court's ability to stick to its original schedule.

b. Use of summary calendars.—There is considerable dispute over the value of oral argument in the appellate process, but a broad consensus that it is not essential in every case.⁸⁹ Many courts use summary calendars, often with a presumption that cases on this calendar will be submitted on the briefs with no oral argument unless a special request is made and granted. The summary calendar approach enables the assigned panel to get started on the decision

89. See, e.g., JUDICIAL ADMIN. DIV., AM. BAR ASS'N, *supra* note 22, § 3.35 and accompanying commentary. This standard provides that the opportunity for oral argument "may be subject to qualifications, established by court rule" in some circumstances. Cf. Anderson, *supra* note 70, at 345-46 & n.177 (noting that thirty-one states have the grant of oral argument to the court). Additionally, in some of the states where oral argument is allowed, a case will be placed on the calendar for oral argument only if requested. In others, the case will be placed on the calendar but the parties can stipulate to no oral argument. *Id.*

process as soon as the briefing process is completed.

c. Early assignment of cases to panels and to a “lead judge.”—Once a truly firm date is set for submission of briefs or oral argument in a case, the case can be assigned to a panel. Some courts also assign one of the judges on the panel to be the preliminary author of the decision in the case at the time it is sent to the panel. The practice of early assignment of a “lead judge” has been criticized as giving one judge undue influence over the outcome of the case. However, it has the benefit of placing primary responsibility for resolution of the case on a single judge and thus helps establish a system of accountability for effective and expeditious preparation of a reasoned decision.

d. Augmenting judicial and staff resources.—Most appellate courts that require lengthy periods of time to render decisions have a backlog—i.e., a large number of cases that have been argued or submitted, but have been awaiting decision for an unacceptably long period of time. To eliminate the backlog, it will be necessary to identify and focus on resolving the “old” cases, while at the same time handling incoming cases in an expeditious fashion. Often, this will require temporary additional resources—for example, extra panels using retired judges or trial judges specially designated to sit temporarily with the IAC.

e. Shorter opinions.—Professors Carrington, Meador, and Rosenberg presented illustrative examples of short memorandum opinions, appropriate for different types of situations, in their landmark study *Justice on Appeal* more than a quarter-century ago.⁹⁰

This approach still offers a sound option for IACs intent on providing counsel and parties with a reasoned, but not unnecessarily lengthy, explanation of a decision. Antagonism to abbreviated procedures in appellate courts among both lawyers and legal academics has been stirred by courts that have resorted to one-word affirmances and decisions without opinion, but the memorandum decision can be both short and sufficient.⁹¹

f. Monthly reports and judges’ meetings.—The Ohio Eighth District Court of Appeals has made consistent use of a practice of reviewing the status of all cases awaiting decisions at monthly meetings attended by all judges. According to judges on the court, the mere existence of the meeting each month stimulates judges to move more quickly to draft a decision. The court has found that discussing the cases regularly in this manner also permits other judges to offer ideas that may cut through the logjam and assist the authoring judge or panel. Some have suggested that the monthly reports be made public.

g. Proactive leadership by the chief judge.—Perhaps the most valuable mechanism for ensuring prompt and effective calendaring and decision-making

90. CARRINGTON ET AL., *supra* note 37, at 243-53 app. B.

91. Some appellate courts must contend with state statutes, usually old, that can be construed as requiring the issuance of full written opinions in all cases. Data collected by the National Center for State Courts indicates that twenty-three of the thirty-five courts that participated in the *Time on Appeal* research project are required to issue a “reasoned opinion.” See Beasley et al., *supra* note 85, at 16 tbl.2. In many instances, of course, a memorandum opinion can be “full” and “reasoned” in the sense that it covers the essential ground.

processes within the court is the chief judge's active demonstration of his or her commitment to an expeditious process. Participants in the roundtable discussion at a meeting of the Council of Chief Judges noted a variety of ways that they could exercise effective leadership in this area. Suggestions included taking responsibility for providing up-to-date and accurate reports to the other judges on trends and productivity, leading monthly meetings at which caseload status is reviewed, supervising central staff attorneys' offices (either directly or through a liaison judge) to ensure that the staff is staying current with its caseload and not keeping cases too long, and meeting one-on-one with judges who consistently fall behind in drafting opinions to discuss the problem and develop a plan for remedial action.

Many of the mechanisms used by the appellate courts to reduce delays and improve performance involve some kind of monitoring and troubleshooting. While new technologies open up possibilities for dramatic improvements, they rarely reduce the need for on going supervision, problem identification, and practical problem-solving.

In examining what kinds of mechanisms have proven successful in assisting intermediate appellate courts to reduce delay and improve performance, mechanisms that involve both monitoring and troubleshooting should be emphasized. Often, technological innovations make it possible to conduct some activities far more swiftly and efficiently than in the past, but rarely do they reduce the need for constant supervision of the process. The important role played by the transcript coordinator in New Mexico illustrates how improved technology—such as vastly improved equipment and techniques used by court reporters—necessitates that attention be given to the critical stages before and after the actual preparation of the transcript. Someone must be watching to ensure that the transcript is properly and timely ordered, segments are not omitted from either the order or the product, and the final transcript is sent swiftly to the court and the parties in order to begin next stage of the process.

The monitoring and troubleshooting functions are critically important, and generally have not been performed well by American appellate courts. They will likely become even more important in the years ahead, as the introduction of new technology brings rapid change to institutions that have tended to look to precedents as the primary guide to decision-making and policy formulation.

V. LOOKING TO THE FUTURE: NEXT STEPS TOWARD IMPROVING APPELLATE CASEFLOW MANAGEMENT

From our review of the literature in the field and our study of the six intermediate appellate courts participating in this project, it appears that not much has changed in appellate case processing in the past two decades. Despite the work of the ABA standards committees, the writings of a few knowledgeable and thoughtful professors and judges, and several empirical studies of case processing that have helped shed light on the problems and on potential solutions, most appellate courts appear to have made little change in the way they handle their caseloads. The types of technological innovations discussed in Part III are very commonly used in business and industry, but have yet to be adopted

for widespread use in appellate courts even though they have great potential for increasing the speed and effectiveness of the appellate process.

As noted in Part IV, the basic strategies and techniques for effective appellate caseflow management are not novel. Indeed, most of them were first advanced in the 1970s or earlier, but they have seldom been adopted in a comprehensive way in state intermediate appellate courts. Most strikingly, the same broad range of case processing times (with very lengthy times required for completion of appeals in some courts) that Martin and Prescott found over twenty years ago⁹² still seems to be prevalent. Particularly in light of the opportunities for dramatic improvements presented by the new technologies, the time seems ripe for renewed attention to appellate caseflow management.

This Part discusses three main types of initiatives that should be helpful in catalyzing action—and, ultimately, significant improvements—in state intermediate appellate courts:

- development of a system for regularly collecting and publishing comparable data on the workloads, resources, structures, operational procedures, productivity, and case processing times of state IACs;
- design, implementation, and evaluation of demonstration projects aimed at significantly improving the expeditiousness of appellate case processing; and
- design and presentation of educational programs focused on appellate caseflow management for judges, court staff, and others at the national, state, and regional levels.

Lastly, we consider the need to integrate caseflow management into the appellate process and some final issues concerning acceptance of this principle by appellate courts.

A. National Data on the Work of IACs

To date, the most comprehensive recent compilation of empirical data on state intermediate appellate courts has been the work done by Roger Hanson in his book *Time on Appeal*.⁹³ That volume has data on case processing time in thirty-five IACs and also includes very useful information on the number of filings in each court, judicial resources (judges and law clerks), structural features, and operational procedures.

Time on Appeal provides a very valuable snapshot of the workloads, resources, and case processing times in IACs in 1993, but it was a one-time effort. There are no regularly produced statistical reports on the work of these courts and no generally available descriptions of their operational procedures.

Development of a system for regularly collecting data on the workloads, resources, organizational structures, operating procedures, productivity, and case processing times of state intermediate appellate courts would have a number of benefits:

- It would increase knowledge about the work of state IACs across the country.

92. See MARTIN & PRESCOTT, *supra* note 8, at xiv.

93. See HANSON, *supra* note 7.

- It would enable comparisons to be made about the productivity and expeditiousness of the courts and should thus provide motivation for improved performance on the part of the courts that rank low on multiple measures.
- While comparisons are especially difficult at present—mainly because of differences in jurisdiction, caseload composition, judicial and non-judicial resources, methods of categorizing types of cases and organizing calendars, and measures used to report case processing times—a focused national effort to develop meaningful statistical data would highlight these differences and should lead to acceptable ways of making meaningful comparisons.
- Comparisons would provoke discussion of the differences and lead to better understanding of the differences, the reasons for them, and the implications (for expeditiousness and other values) of different ways of organizing the work of IACs.
- Analysis of statistical data, coupled with descriptive information about organizational structures and operating procedures, should stimulate identification and adaptation of the best practices and experimentation with new approaches.
- Accurate information on workloads, resources, structures, and performance should assist in the development or refinement of appropriate standards of performance and, ultimately, should lead to improved performance and greater accountability.

Although it would be desirable to include all IACs in a national statistical data collection effort, it is more feasible to start with a subset. By beginning this effort with a manageable number of courts—say, between eight and sixteen—it should be possible to work through most of the methodological issues encountered without spreading resources too thinly.

In considering the types of information needed, care should be taken in the development of accurate descriptions of the organizational structures, allocation of resources, and operating practices and procedures of the courts. Without such descriptions, statistical data has little use. The descriptive information enables observers to understand how a court actually works, gives meaning to the statistical information, enables comparisons to be made across courts, and provides baseline information essential for measuring the impact of the introduction of new policies.

Care must be taken, too, in the development and presentation of statistical data, particularly with respect to performance measures. Because of the significant differences among IACs in case volume, resources, caseload composition, definitions of terms, operating procedures, and other factors, it will be necessary to devise methods for collecting relevant data, organizing it to enable relevant comparisons to be made, and presenting it using a variety of performance indicators.

Grant funding would undoubtedly be helpful (and may be essential) to get a multi-court IAC data collection and analysis effort started. In the long term, however, this initiative should be supported by state judicial systems and state legislatures. The courts themselves, the judicial systems of which they are integral parts, and the public will be the beneficiaries of greater knowledge about

the performance of these institutions.

B. Demonstration Projects

Demonstration projects can provide an opportunity to assess the viability of combining new technology with other programmatic innovations to achieve ambitious appellate caseload improvement goals. For example, it should be possible to design and evaluate demonstration projects that incorporate most or all of the following components in a system for handling major segments of an IAC's caseload:

- establishment of clear goals for appellate case processing, including time standards for overall case processing time and for case processing time in the major stages of the appellate process (record preparation, briefing, and appellate court decision-making);
- use of computer-aided transcription or other transcript-preparation methods to consistently enable preparation of transcripts within a seven-day period following completion of the trial;
- provision for the filing of a notice of appeal (with a copy to the IAC) within fourteen days after the conclusion of the trial; for any outstanding issues relating to the appeal (e.g., eligibility for appointed counsel, waiver of fees, agreement on contents of the record) to be resolved within ten days thereafter; and for a docketing statement with key items of information about the parties and the issues on appeal to be filed within twenty-one days after the notice of appeal is filed;
- filing of the clerk's record and the trial transcript within thirty days after the notice appeal is filed, using electronic transmission if possible;
- issuance of a briefing schedule and tentative argument/submission date by the appellate court on or (if the information in the docketing statement permits) prior to the date the clerk's record and the trial transcript are filed;
- use of computer-based management information reports to enable appellate courts to monitor for compliance—on the part of court reporters, trial court clerks, and appellate attorneys—with the time requirements established for the demonstration projects;
- establishment by the IAC of internal mechanisms and procedures to help ensure the prompt completion of all stages of the process, specifically including designation of a judge and/or senior staff person to actively monitor compliance with time requirements in the record preparation and briefing stages; and commitment by the chief judge to actively monitor compliance by the judges with time standards for the completion of work on cases assigned for decision; and
- reports made periodically by the court, to the state administrative office of the courts and to the bar and other interested groups, on the court's performance in relation to the goals set for the project.

The evaluation component of such a demonstration project will be critically important. Evaluation should help the program's leaders and the funding sources know the extent to which the project is effective (in particular, whether it is more effective than alternative approaches, including prior practices) and learn why it

works or fails to meet expectations. Developing and evaluating demonstration projects is a natural complement to a comprehensive research strategy and will also help strengthen national-level and state-level education and training efforts.

C. Education and Training

Despite the clear need for more effective case processing in appellate courts, few vehicles exist to educate appellate judges, staff (especially appellate court clerks and central staff attorneys), bar members, and other stakeholders about the concepts and techniques of sound appellate caseload management.

One promising approach, used successfully to introduce innovations such as intermediate sanctions and drug courts at the local level, is to design educational programs for “teams” of policymakers and practitioners, whose collaboration and commitment will be essential for a significant case processing improvement effort to succeed. For a workshop on appellate caseload management improvement, logical members of a jurisdictional team would include at least the chief judge, the clerk of court, and the chief staff attorney. Depending on the circumstances in the jurisdiction, other potential members of the team could include the appellate court’s chief information officer or other senior member of the administrative staff of the court, chiefs of the appellate litigation sections of major institutional litigants (e.g., attorney general’s office, prosecutor’s office, and public defender’s office), a bar association leader knowledgeable about appellate practice, the chief judge (and/or clerk, court administrator, or chief court reporter) of a major urban trial court that is the source of a significant percentage of the appellate court’s caseload, and a legislative leader.

Workshops for jurisdictional teams are probably best conducted at the national or regional level. Such a workshop can be a vehicle for presenting information and ideas about appellate caseload management and, most importantly, for members of the participating teams to set goals and begin development of a plan for significant improvements in case processing. At a minimum, the workshop should provide opportunity for the key stakeholders to take a hard look at the situation in their own jurisdiction, exchange information and ideas about perceived problems, and gain a better understanding of the concerns of others whose involvement will be essential for progress to be made. In addition to workshops for teams, it will be helpful to have programs for individual judges, clerks, and staff attorneys, presented at the state or individual court level as well as at the national level.

D. Integrating Caseload Management into the Appellate Process

The concept of caseload management is simply not widely understood or applied in appellate courts. Indeed, one observer, commenting on an earlier draft of this manuscript, suggested that the authors should not assume that the culture of courts in general—and appellate courts in particular—accepts timeliness as an overarching value.

Timeliness need not be regarded as an “overarching” value, but it is unquestionably an important value in American jurisprudence and in public attitudes toward courts. Timely resolution of disputes is widely recognized as an

essential characteristic of a well-functioning justice system. Recognizing that timeliness affects the quality of justice, virtually every state has adopted statutes and court rules designed to produce expeditious case resolutions. In every survey of public attitudes toward courts and the justice system, delay (along with the expense of litigation) emerges as a major complaint of citizens.

If timeliness *is* an important value, and if there is good evidence that expeditious appellate case process *is* achievable,⁹⁴ then what must be done to address the chronic problems of delay that plague most intermediate appellate courts? Like Rosenberg more than three decades ago, we reject the “one-injection miracle cure” approach and recognize that progress is most likely to come from marshaling relief measures in groups.⁹⁵

The preceding section has outlined three complementary approaches—collection and dissemination of comparative data on court performance, implementation and evaluation of demonstration projects, and a sustained focus on education for key stakeholders—that should help catalyze improvements. Additionally, a broad range of strategies and techniques—many of them described in Parts III and IV and in the Appendices to this report—can be employed to address issues of backlog and delay. For real progress to be made, however, justice system leaders—most importantly (but not exclusively), the chief judges of the intermediate appellate courts—must acknowledge timeliness as an important value and recognize the necessity of integrating caseflow management principles and techniques into the appellate process.

Integrating caseflow management into the appellate process should be possible without infringing upon other important values of a well-functioning intermediate appellate court. These other values include:

- impartiality in decision-making;
- the capacity for judges to read and think individually about cases that come before them;
- collegiality in decisionmaking and opinions;
- reasoned decisions;
- uniformity and consistency in decisions; and
- working conditions that attract lawyers of high quality to the appellate courts, keep them on the bench, and foster their concern for individual litigants and for the integrity of the appellate process.

In an environment that requires group decision-making processes and includes strong-minded individuals, disagreements over the relevance of conflicting precedents, the appropriate application of law to the facts of particular cases, and a host of other issues are inevitable. In some cases, substantial amounts of time may be required to reach decisions or resolve differences over the wording of an opinion. A sound approach to caseflow

94. A few intermediate appellate courts—notably the Minnesota Court of Appeal and the three divisions of the Tennessee Court of Appeals—clearly handle their caseloads very expeditiously. See HANSON, *supra* note 7, at 12-18; see also Beasley et al., *supra* note 85, at 14 tbl.1.

95. Cf. Rosenberg, *supra* note 53, at 55.

management will acknowledge the inevitability of some disagreements within the court and the need for time to resolve some differences prior to the issuance of an opinion. However, it will also recognize that a high proportion of cases involve no sharp disagreements, which should permit the issuance of an opinion in a relatively short period of time. Similarly, a sound approach to caseflow management will recognize that some cases should be allowed extra time for the filing of the record or the preparation of briefs, but will also recognize that in a high proportion of cases it is feasible to complete these stages quite expeditiously. Perhaps most importantly, a sound approach to caseflow management will recognize that, in addition to the parties' interests, there is a strong public interest in minimizing delays and that the appellate court must exercise responsibility for the expeditious operation of the process, beginning at the time a notice of appeal is filed.

Timeliness in the resolution of appeals and the integration of caseflow management into the appellate process are fundamentally leadership issues. They are issues with respect to which sustained attention from persons in positions of leadership over a period of years will be important. Given the rapidity of leadership changes in IACs (with the chief judge position often rotating on a yearly basis), it seems desirable to develop a leadership group or cadre committed to expeditious appellate case processing. Within each court, the cadre would logically include other judges (especially those likely to become future chief judges), the clerk and chief deputy clerks, and the chief staff attorney. Externally, the leadership group could include the heads of the appellate sections of major institutional litigants, bar leaders who specialize in appellate litigation, legislative leaders, and—perhaps most importantly—the chief justice of the state's court of last resort and the state court administrator.

In some states, statutes, court rules, established case law, and long-established practices may have to be changed in order to achieve effective caseflow management. However, archaic statutes, rules, precedents, and practices *can* be changed when they clearly lead to undesirable results. If court and bar leaders are truly committed to timeliness as an important value in the judicial process, they will find ways to achieve the changes and integrate caseflow management into appellate court operations.

While opportunities for improvement in the operation of intermediate appellate courts abound, there is also some cause for optimism. Some IACs have organized and mobilized themselves to integrate caseflow management concepts and techniques into their cultures. They have communicated their goals and expectations to the bar and to the trial courts, and they have modeled expeditious case processing by rendering their own decisions in a timely manner. Perhaps most importantly, they have taken responsibility for the entire appellate process, from the filing of a notice of appeal to the issuance of a decision in the case. Although much more remains to be learned and done, there is a good base of knowledge and experience on which to build.

Table 1. Descriptive Information for the Six Courts

	Maryland	New Mexico	Ohio 8th District	Ohio 10th District	Washington I	Washington II
Geographic Scope of Jurisdiction	Statewide	Statewide	Regional (single county judicial district)	Mixed (statewide for some administrative law matters; single county for others)	Regional (3 judicial districts, 6 counties)	Regional (13 counties)
Number of Judges	13	10	12	8	10	7
Size of Panels	3	3	3	3	3	3
Method of Selection	Governor appoints; retention election	Partisan election; non-partisan retention	Non-partisan election	Non-partisan election	Non-partisan election	Non-partisan election
Selection Area	Circuit & Statewide	Statewide	Statewide	Statewide	District	District
Term (Years)	10	8	6	6	6	6
Term of Chief Judge (Years)	Indefinite	2	Varies (usually 1 year)	Varies (usually 1 year)	2	2
Use of Senior Judges	No, but retired judges are used	No	No	No	No	No
Number of Non-Judge Judicial Officers	None	None	None	3 appellate magistrates	4 commissioners	2 commissioners
Number of Law Clerks per Judge	2	1	2	2	2	2
Number of Staff Attorneys	9	15	6	7	7	3

Table 2. Appeals Filed in 1999 in Relation to Judges and Other Judicial Resources

	Maryland	New Mexico	Ohio 8th District	Ohio 10th District	Washington Division I	Washington Division II
Filings	1962	948	1833	1500	1879	1229
Number of Judges	13	10	12	8	10	7
Filings Per Judge	151	95	153	188	188	176
Number of Law Clerks for Individual Judges	26	10	24	16	20	14
Filings Per Law Clerk	75	95	76	94	94	88
Number of Staff Attorneys	8	15	6	7	7	2
Filings Per Staff Attorney	245	63	306	214	268	615
Filings Per Combined Judge and Law Clerk Resource	50	47	51	63	63	59
Filings Per Composite Judicial Resources (i.e., per combined total of judges, other judicial officers, law clerks, and staff attorneys	1962/47= 42	948/35= 27	1833/42= 44	1500/34*= 44	1879/41**= 46	1229/25***= 49

* Includes three appellate magistrates.

** Includes four commissioners.

***Includes two commissioners.

Table 3-A. Filings and Dispositions for the Six Courts, 1998

	Maryland	New Mexico	Ohio 8th District	Ohio 10th District	Washington Division I	Washington Division II
Civil Filings	1186	533	1435	1307	740	479
Civil Dispositions	1175	413	1237	1279	717	480
Criminal Filings	765	424	709	345	821	597
Criminal Dispositions	804	371	663	364	861	499
Total Filings	1951	957	2144	1652	1561	1076
Total Dispositions	1979	784	1900	1643	1578	979

Table 3-B. Filings and Dispositions for the Six Courts, 1999

	Maryland	New Mexico	Ohio 8th District	Ohio 10th District	Washington Division I	Washington Division II
Civil Filings	1219	573	1265	1145	684	414
Civil Dispositions	1167	390	1217	1294	769	470
Criminal Filings	743	375	568	355	742	516
Criminal Dispositions	661	370	644	328	839	596
Total Filings	1962	948	1833	1500	1426	930
Total Dispositions	1828	760	1861	1622	1608	1066

Table 4-A. Time from Filing to Disposition in the Six Courts, 1999

	Maryland	New Mexico	Ohio 8th District	Ohio 10th District	Washington Division I	Washington Division II
Average time, from filing to resolution—all cases	322 days	Reg. Cal.: 428 days Summ. Cal.: 160 days	Reg. Cal.: 479 days Summ. Cal.: 237 days		536 days	568 days
Days to resolve 75th percentile case	Civil: 336 days Criminal: 344 days				Civil: 592 days Criminal: 797 days	Civil: 605 days Criminal: 805 days
Days to resolve 95th percentile case	Civil: 425 days Criminal: 443 days				Civil: 615 days Criminal: 1054 days	Civil: 652 days Criminal: 955 days
Percentage of cases pending longer than 210 days from filing*			1st Q: 44.7% 2nd Q: 50.4% 3rd Q: 50.4% 4th Q: 47.9%	1st Q: 35.4% 2nd Q: 33.7% 3rd Q: 32.3% 4th Q: 30.0%		

* A special 180-day guideline applies to original actions. These data include cases beyond that guideline.

Note: Where no information is shown, it was not possible to obtain data from the courts' reports.

Table 4-B. Time from Filing to Disposition (in Days) in the Six Courts, 1998

Maryland	New Mexico	Ohio 8th District	Ohio 10th District	Washington Division I	Washington Division II
75% decided: Civil-392 Criminal-355	Average time (in days): Regular-470 Summary-153	Average time (in days): Regular-396 Summary-219 Non-merits cases: Regular-92 Summary-54	Percentage of cases pending past 210-day guideline*: 1stQ-32.5% 2ndQ-36.7% 3rdQ-32.3% 4thQ-33.6%	75% decided: Civil-644 Criminal-644 95% decided: Civil-865 Criminal-1152 Average time: Civil-554 Criminal-568 All Cases-563	75% decided: Civil-687 Criminal-690 95% decided: Civil-988 Criminal-1082 Average time: Civil-587 Criminal-601 All Cases-594
95% decided: Civil-553 Criminal-507					

* A special 180-day guideline applies to original actions. These data include cases beyond that guideline.

Table 4-C. Time from Filing to Disposition (in Days) in the Six Courts, 1999

Maryland	New Mexico	Ohio 8th District	Ohio 10th District	Washington Division I	Washington Division II
75% decided: Civil-336 Criminal-344	Average time (in days): Regular-428 Summary-160	Average time (in days): Regular-479 Summary-237 Non-merits cases: Regular-114 Summary-52	Percentage of cases pending past 210-day guideline*: 1stQ-35.4% 2ndQ-33.7% 3rdQ-32.3% 4thQ-30%	75% decided: Civil-592 Criminal-797 95% decided: Civil-615 Criminal-1054 Average time: Civil-521 Criminal-546 All Cases-536	75% decided: Civil-605 Criminal-805 95% decided: Civil-652 Criminal-955 Average time: Civil-521 Criminal-601 All cases-568
95% decided: Civil-425 Criminal-443					

* A special 180-day guideline applies to original actions. These data include cases beyond that guideline.

Table 5. Average Time (in Days) in Stages for Appeals, 1999

	Notice to Record Filed	Record to Brief Filed	Brief Filed to Argument or Submission	Argument or Submission to Decision
Maryland Civil	189	96	53	65
Maryland Criminal	71	114	40	85
New Mexico Summary	94†		54	14
New Mexico Regular	142	113	82	124
Ohio Eighth District	49	145	216	35
Washington Division I	128	172	246‡	
Washington Division II	111	328	262‡	

† This figure is the total in days from notice of appeal until calendaring and the next figure is the total in days from calendaring until submission. Briefs are not filed in summary cases in New Mexico.

‡ These figures are the totals in days from the completion of briefing until decision.

Appendix A
Note on the Impact of Technology on
Appellate Caseflow Management

ROGER A. HANSON*

Appellate court performance can be enhanced through the use of existing and future technological possibilities. Introduction of automated processing is a way for courts to improve their record-keeping and related functions and to increase their efficiency. Both record-keeping and efficiency are central to case management, which in turn underlies the resolution of cases in a timely manner. For state intermediate appellate courts, in general, and the courts under study, in particular, improvements in both of these areas are warranted.

At the general level, intermediate appellate courts have experienced substantial technological innovations. During the 1980s, many, if not most, courts saw the implementation of first (or subsequent) generation online docketing systems. These systems either replaced strictly manual systems with ledgers and paper and pen entries, word processing systems limited to generating notices and orders, or mainframe systems that were part of larger county or state-wide proprietary arrangements with fixed report production generation capabilities. These were often designed to meet the record-keeping needs of executive agencies who controlled the configuration of software design.

For the courts under study, the ability to generate management information related to timeliness was constrained. All of the courts had difficulty in providing information on the timeliness of civil and criminal appeals at basic steps in the appellate process for cases on either a regular calendar or a special expedited calendar. The information generated and used in this report was delivered at some cost and energy to the courts involved. Data were not a product of point-and-click movements. Thus, the project appreciates the generous efforts that the courts made to respond to our requests. Nevertheless, the information obtained was not as complete as it should have been, and the inability of most courts to generate adequate information greatly restrains the opportunity to compare time frames among the courts.

In this Appendix, we examine how improvements in technology might substantially increase what state intermediate appellate courts know about their degree of expedition as well as enable them to see how they stand in relation to others. Three areas of technology are the focus of attention. These are automated management information systems, issue tracking, and electronic filing. For each area, suggestions are made on how courts can benefit from these technological applications, what questions they need to ask in considering their usage, and what guidelines they might follow in sorting out possible

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configurations of technology. The discussion is aimed at providing courts with a framework to use in assessing the desirability of possible technological applications.

1. *Management Information Systems.*—The basic technological application that appellate courts need to consider involves the development of a method for obtaining information on how timely they are in discharging their decision-making obligations, ranging from ruling on procedural motions to rendering opinions after oral argument. The following five recommendations or guidelines are intended to provide appellate court judges and administrators with some basic premises that will affect their efforts to design adequate systems and to work with management information specialists to make either local area networks (LAN) or wide-area networks (WAN) flexible and practical management information systems.

Guideline Number One: A management information system is different from an automated docketing system.

Many appellate courts have automated docketing systems, but this information is stored primarily for the purpose of tracking events in the life of a case (e.g., filing dates for critical events, the outcome of rulings on motions and the final resolution of an appeal, and the pending status of cases) for record-keeping purposes. The functional difference between an automated docketing system and a management information system is that record-keeping systems do not support a platform for analysis of case processing. In some mainframe environments, the preparation of management reports is contingent on a management information specialist writing code to extract appropriate cases. The time and resource requirements needed to write appropriate code to perform statistical calculations cannot be considered trivial, and, logically, it becomes a greater burden as the bench becomes more sophisticated and asks for more advanced, exploratory, and explanatory management reports.

Consequently, the appellate court leadership needs to recognize that the daily operation of a management information system is a function that should be kept separately from the tasks of system administration and maintenance (e.g., gateways, routers, and protocols). In all likelihood, the platform required for a management information system will entail a viable, stand-alone end-user environment (i.e., LAN or WAN based personal computer (PC) environment) to support the periodic analysis of all available caseload information. Once the court recognizes the distinction between the two functions (and that as the functions are discrete, so too should be the platforms that support the tasks), it will be easier to envision how to proceed to produce the type of information and reports the court deems worthwhile.

Guideline Number Two: There are a wide range of hardware and software configurations that can support a management information system platform.

In its simplest form, the system might entail one individual working with one PC using any number of available off-the-shelf statistical software packages, as well as any available proprietary software. Often the matrix of data (or, where courts are using relational databases, the tables of data and relations) that is, in fact, the court's "information" can be imported (if not already in a PC environment) into a PC that uses any number of software packages. This type of

management information system has limitations such as restricted read-and-write accessibility and difficulty supporting any number of concurrent users.

A more accessible system configuration would support multiple users whether or not a judge, administrator, law clerk, secretary, senior staff attorney, clerk, and deputy clerk of court each had his or her own personal computer as part of a LAN (or WAN). The implication of the wide range of available configurations is that the type of output the judges and administrators wish to generate should drive the process of system design and configuration, not vice versa.

Guide Number Three: Some of the simpler types of management information systems can take advantage of hardware already in place and minimize the resources expended to implement a workable information system.

Some very sophisticated PC software that can handle significant size databases (e.g., twenty, thirty, or forty megabytes) while executing advanced statistical techniques and procedures can be obtained at reasonable costs. Hence, the financial, personnel, and time resources a court must expend need not be viewed as necessarily prohibitive.

Guideline Number Four: The utility of any information system is contingent upon the individuals who use the system and the purposes for which it was created.

Judges, managers, and court staff need to communicate their respective questions and concerns to each other. Management information needs to be demystified. It is not the by-product of some elaborate configuration of technology that can solve problems confronting the court. A management information system is defined by its end users, their ability to manipulate the application and utilities available to them, and the benefit derived by those users from the information they extract to understand the operations of the court. Some management information specialists might focus on hardware, but it is necessary to devote an equal amount of resources to cultivating end user expertise.

Guideline Number Five: The utility of management information systems correlates directly to the ability of each end user to apply the information received.

Each end user will define a “useful” information system differently; all information systems will evolve and progress over time and different parts of the courts will variously converge and diverge in their interests and needs. Indeed, the information required by the judges will not always be the same as the management information requirements of the court administrative office in monitoring case processing or as the clerk’s office in producing case processing notices, letters, and reports. For this reason, it is preferable for systems to possess a great deal of flexibility and have the capacity to change and adapt. Judges and court managers should be particularly leery of any docketing or information software (whether proprietary or from a commercial vendor) that promises to serve as a once and future panacea. Rather, it is important to understand that all management information systems will need to undergo periodic restructuring to remain current and to support the evolving legal and court environment, as well as the changing needs of the end user.

These guidelines should permit administrators and judges to have a more focused dialogue concerning management information systems. Judges will learn that the court can be responsive to their needs, and they should be able to suggest a range of alternative computer and software configurations and a series of viable options as opposed to forced choices.

2. *Issue Tracking*.—A second type of technological application particularly relevant to appellate courts is the use of automation to support issue tracking. This use of technology is not new, but it merits attention because, although it has proven highly successful in some instances, it has not been adopted on a widespread basis. Essentially, if a court has an on-line docketing system, acquisition of additional software will allow data relating to procedural events and dates to be combined with new data on issues and, thereby, permit identification of similar cases. The necessary software is available for purchase or can be developed in a proprietary form by a court.¹ Data on issues require the development of a dictionary of issues, statutory provisions, and case law. Pending cases then are examined for the purpose of issue and statutory classification to see if there is a group of similar pending cases that might be put on the same calendar for a single panel's consideration.

The clustering of cases permits the resolution of an issue by a lead case, whose opinion is applicable to the remaining cases, so that the remaining cases are decided in a more summary fashion. Where the issues in cases are identical, greater efficiency and improved quality are realized because judges can read the same statutes and case law for many cases and spend more time on lead opinions. Where the issues resemble one another, background work is pertinent to all the cases and the panel is likely to gain greater familiarity within the area of law represented by the issues.

A court that developed its own issue tracking system in conjunction with its development of an on-line docketing system is Division One of the Arizona Court of Appeals in Phoenix. Before the additional software was put into place, the court used a software package to search for cases with common issues. As a result, it can assess the advantages and disadvantages of relying on software that is readily available compared to developing proprietary software.

Issue tracking operates in Division One with the chief civil and criminal staff attorneys categorizing individual cases based on issues listed in the docketing statement and entering the issue-related information into a database according to codes the staff attorneys have established. Once a case has been perfected, the information obtained from the on-line docketing system is added and the issues stated in the briefs are reviewed to check issue consistency. The staff attorneys use information from the database in assigning cases, on a weighted basis according to issue difficulty, to other staff attorneys who prepare prehearing memoranda for the panels of judges.

1. Available software packages are likely to cost a few hundred dollars and can be installed on a PC. Data from the docketing system can be imported into the PC and merged with the data to be entered on the issues.

Concerning issue tracking, the chief staff attorney informs the court clerk of issue similarities prior to the calendaring of cases. As a result, the clerk might assign six to nine additional cases dealing with the same issue (e.g., premises liability relating to swimming pools, restitution, or revocation of driver's licenses) with a resulting increase in the total number of cases decided each month, without requiring additional work by the judges. The productivity gains from additional cases being assigned to panels in Division One proved sufficient to reduce a substantial criminal case backlog, despite a considerable increasing trend in the number of appeals filed with the court.

For other courts, the desirability of an issue tracking system hinges on the answers to several questions. Are there a substantial number of single-issue cases? Are they likely to involve the same or similar issue in many instances? Does the court believe that it decides cases on the basis of issues even through the factual circumstances might be different? If all the answers are affirmative, then an issue-tracking program warrants further investigation.

3. *Electronic Filing*.—A third area of technological innovation that promises to improve the efficiency of the appellate process is the use of electronic communication among parties, their attorneys, and a court. The possible forms or documents to be sent to a court include pleadings, motions, transcripts, and briefs. The use of Internet technology and appropriate software make it possible for documents to be prepared on an attorney's PC, and the data from those documents to be transmitted, received, and stored by a court in exactly the same format. Because the documents are being communicated electronically instead of in the paper format, the innovation is called "e-filing."

Three kinds of cost and time savings in communications to attorneys are apparent and need only be summarized. First, documents can be sent without the expense of either hand delivery or messenger services. Furthermore, there is no printing cost, photocopying cost, and no use of envelopes, postage, or communication management. Electronic communication is virtually communication cost-free to attorneys.

Second, electronic communication is compatible with how attorneys prepare documents. Most attorneys no longer dictate or compose in long hand. Because attorneys are accustomed to PCs and laptops, they do not need to master new technology to avail themselves of e-filing. Hence, their learning how to communicate electronically is virtually cost-free. Third, the instantaneous transmission now available avoids the inevitable and frequent inconveniences associated with other methods of communication. Even the speediest messenger might have to wait in line or incur transportation problems. Thus, the risks of late delivery are minimized and the anxiety costs of possible missed deadlines are almost zero with electronic filing.

Yet, despite these obvious gains in efficiency, the application of electronic filing has been limited, particularly to federal trial and bankruptcy courts, with some application in selected state trial courts and with minimal experience in state appellate courts. The Arizona Court of Appeals, Division Two, in Tucson, and the North Carolina Supreme Court are two exceptions. Based on this experience, the focus here is on questions that state appellate courts are likely to have when they consider the advantages and disadvantages of integrating

electronic filing into their existing case management systems. *A court without a case management information system is not a promising candidate for electronic filing because the advantages to a court of accessing documents stored electronically will be lost with a manual information system or a strictly on-line docketing system.*²

It is also important to focus more narrowly on the questions a court needs to ask concerning the gains that it might receive from an electronic filing system, what it must do to secure those gains, and what costs it is likely to incur that might offset gains in productivity or efficiency. Looking at e-filing from an intermediate appellate court's perspective, there are six key questions surrounding the benefits of e-filing.

As more knowledge is gained through technological improvements and more experience is gained from more pilot programs, the questions will change. The questions are not necessarily listed below in order of importance, but they begin with those likely to be raised in a court possessing minimal working knowledge of electronic filing and proceed to those that might be raised in courts that already have some background information or contact with electronic filing.

The first question concerns the possible benefits to a state appellate court from electronic filing. The list of positive incentives is somewhat theoretical because of the limited applications to date. However, the leading benefits are thought to include the following:

- Greater preservation of documents by avoidance of lost, damaged, or stolen paper case files.
- Reduction in the storage costs of paper documents.
- Reduction in the time and personnel required to store and retrieve paper documents.
- A search capacity, not available by reading paper documents, that enables topics of specific interest to be located expeditiously in lengthy documents.
- A greater opportunity for multiple people, such as judges, managers, and court staff, to access and read documents simultaneously than when paper documents have to be shared.
- Tighter integration of legal documents, key procedural events, and dates than when papers are in case files and separated from either a manual or an on-

2. See JAMES MCMILLAN, A GUIDE TO ELECTRONIC FILING (1999).

A modern case management system also is required. Case management systems currently are responsible for tracking all cases, documents, filing fees, judge and jury assignments. . . . In an electronic filing environment, the case management and document management systems must be integrated. Data can be shared between these systems without re-keying. . . .

The benefits of this integration include significantly faster and more accurate access to case information. For example, while it will be possible to perform text searches in the document management system to find papers, using this approach exclusively could prove inefficient because the same data formatted for document retrieval may exist in many other pleadings. . . .

Id.

line docketing system.

To realize these promising gains in efficiency, the second question concerns the form in which the court uses the documents it has received electronically. Does a court need to use documents only in an electronic format to gain the benefits of e-filing? What if copies are made? Who pays for them? Does the photocopying of multiple copies eliminate savings in storage costs? Basically, this question focuses on whether a court under an electronic filing system might end up paying the costs of reproduction that attorneys previously bore. To avoid this situation, does electronic filing appear to require that either judges, court employees, or both restrict their review of documents to the electronic form?

It is unlikely that e-filing will make a court a "paperless" institution. However, the extent to which the benefits of e-filing are secured hinges on the extent to which judges and court staff are willing to read and use documents in electronic format (i.e., on a computer screen).

This question is likely to remain salient until the emergence of a new generation of appellate judges who are more accustomed to reviewing and analyzing documents electronically. Hence, a considerable amount of education on the value and ease of viewing documents electronically, aimed at judges, would seem necessary to e-filing's success.

A third question: how does e-filing work? Is it like e-mail? E-filing is not e-mail with an attachment, but the process can be viewed as follows. An attorney decides to file a document and prepares it on a PC. Then the attorney connects to a court's (or private company's) Internet page and clicks on a link to enter an e-filing system. The attorney provides a username and password assigned by the court, which accepts them as a signed signature. The attorney responds in a menu format to a series of queries posed by a court's (or vendor's) software: What is the type of document, case file and name, the party filing the document, and the document itself? Once the filing is completed, the court's computer responds with an electronic document receipt and serves other attorneys based on a pre-established list of attorneys capable of sending and receiving messages electronically. Additionally, appropriate docket entries are made and the document becomes part of a case management system strictly for access by the judges, managers, and court staff.

A fourth question concerns hardware and software requirements for the transmission of documents from the outside to the court. The federal court experience is considerable. Basically, attorneys practicing in federal courts where e-filing already exists must have Internet access and Web browser software so that they can access a court's software. Currently, an attorney will also have to have a Portable Document Format (PDF) writer and reader to upload and retrieve electronic filings. For a court, two servers are needed. One server handles access from attorneys and the other handles a court's access to documents received and a court case management system.

In the federal court context, an attorney would prepare a document on a PC with a word processor of choice. The document would be saved and then printed using Adobe's PDF Writer. Using a Web browser, the attorney would then connect to a court's home page and file the motion. The attached PDF document

(PDF is a proprietary standard for Adobe, Inc. that enables a document to be displayed exactly as it was prepared) would then be forwarded to a court's Website and stored in its database.

The federal court hardware and software configuration might be considerably different from possibilities in state appellate courts because the federal initiative is being guided by the Administrative Office of the U.S. Courts, which is developing a joint integrated next-generation management information system with electronic filing. This comprehensive system connects attorneys through the Internet to an e-filing system. Those documents are connected through an in-house-designed web server to an in-house-designed case management and document management system.

State courts might not have the resources required to develop and maintain all of the necessary hardware and software capabilities. However, a variety of private companies have the necessary hardware and software, as well as expertise, to link attorney-based communications to a court. What a state appellate court must decide is what components the court can "outsource" to private companies. If a court decided that a private company should provide the transmission both between filers and the court, attorneys would log on to a private company's website and follow procedures (menu choices) in stating what was being filed. Documents would be filed with the court electronically because the company had set up a separate connection between its system and the court's web or e-mail server. However, whether the court provides its own e-mail filing system or depends on an e-mail provider (vendor), the court still needs to connect the electronic documents to its case management and document management systems. Otherwise, the court will realize few efficiency gains. It will also be important that the filings are retained in the court's, rather than the vendor's, archive.

This description suggests that the tools of electronic communication are neither available to everyone nor free. Investments by attorneys in paying fees to a vendor and by a court in connecting its case management system to electronic document systems are required, with the expectation that not every party or attorney will file electronically. Thus, courts need to be prepared to continue to have paper submissions, and for the foreseeable future, endure the costs of running parallel filing systems.

A fifth question addresses the kinds of documents an appellate court especially benefits from receiving electronically. Having electronically-transmitted transcripts can potentially be advantageous because of the reduction in storage costs and because of the benefits of a search capacity in reviewing lengthy documents. Yet, will judges be willing to review lengthy electronic transcripts in complex civil and criminal cases? Perhaps their central staff attorneys and law clerks might, but will judicial acceptance of their new practice require a lengthy transition period? Moreover, this topic of application suggests that the benefits of conversion from paper to an electronic format are not simply quick communication, but they also fall in the management and analysis of lengthy documents with benefits redounding to a court, attorneys, and court reporters. The ability to store and communicate transcripts electronically seemingly would be in the self-interest of reporters both in terms of management

ease and cost effectiveness. Moreover, this aspect of electronic documents would appear to be viable without a court's involvement.

Sixth, what have been the experiences of state appellate courts to date? An effort in the Arizona Court of Appeals, Division Two, at Tucson, is a multi-phased project that currently services the legal defenders office and soon will include the office of the attorney general in the submission of motions and briefs, with plans to expand similar electronic filing service to other litigants. An ambitious phase to be implemented this year will allow the court's major trial court (Pima County, Tucson) to submit the record on appeal electronically.

Concerning the first phase that enables the two institutional offices to transmit documents, the court has set up the electronic filing system with internal funding. Attorneys in the two institutional offices connect with the court's website on the Internet and register, set up cases, and send documents that are stored on the court's server. The attorneys are required to have a PC, access to the Internet, and a Java-enabled browser. The court has an electronic document management system in place that integrates electronic documents received with its case management system. This system has been operational since 1998.

The planned phase involving the appellate record is called the Blueback Project because the Pima County Superior Court Clerk uses blue paper backing to send the paper record to the court of appeals. The anticipated and forthcoming change will allow the clerk to electronically transmit imaged paper records and indices of the records to the appellate court.

Prior to transmission, the clerk will convert the imaged documents from a proprietary IBM format to a standard TIF format, with some necessary software work funded by the court. Once converted, the record and index of the record will be incorporated into the court's electronic document management system, which will update the court's case management information system and make the record in the case available to all court personnel in Division Two.

Members of the court and outside attorneys anticipate particular consequences from the switch to electronically-stored documents. Many predict that practice with the new system will be the key to reducing cost and storage problems inherent in traditional paper systems. Law clerks, central staff attorneys, and justices believe that only through experience will they have a realistic sense of the magnitude of these savings. For example, they think that only by repeated attempts will they know how to gain the maximum value of a search capacity in analyzing documents. Interestingly, outside attorneys have a parallel outlook because they believe that paper copies will still be needed in some instances. Given that the thrust of the new system is aimed at criminal appeals, the views of criminal defense attorneys are pertinent. Those attorneys see the continuing importance of paper to show clients in particular instances (e.g., in *Anders*³ cases or habeas corpus petitions) copies with the court's hand-stamped acceptance to avert claims of ineffective assistance of counsel. Whether

3. See *Anders v. California*, 386 U.S. 738 (1967) (requiring a court to afford a full internal review to any motion to withdraw from representing the indigent client based on asserted lack of applicable issues by court-appointed counsel in a criminal case).

these and other possible concerns are on target will be tested in the near future. Hence, it will benefit not only Division Two but other courts as well if an evaluation is in place to capture the effects of the innovation.

The North Carolina Supreme Court began a parallel initiative in 1999 with the support of the State Justice Institute and a partnership with IBM. Institutional law offices, private attorneys, and pro se litigants can transmit a broad range of documents to the court. Potential users need a PC, access to the Internet, a browser (the court recommends Microsoft Internet Explorer), and the Adobe Acrobat software, which converts a word processing document or scanned image into a single PDF file that can be accepted by the e-filing system. Electronically-generated documents such as motions, petitions for review, and briefs are the customary documents transmitted, although paper documents such as transcripts and exhibits can be transmitted if scanned into electronic form by a user.

Users contact a Web page, established and currently maintained by IBM. The users register on the Web page and establish usernames and passwords. Actual use of the system is accomplished through a link on the Web page to a set of step-by-step instructions. Documents are transmitted from a user's PC to the Web page and from there to a server maintained by the court. The data on the form that a user has entered are then imported from the server into the court's case management system (via Visual FoxPro database management software). As soon as the data have been transmitted, a screen comes up on the Web page and informs a user that a document has been received. This screen can be printed out and serve as a receipt of timely filing. Additionally, an electronic mail message is sent to the user verifying receipt of a document. Finally, after receiving a document, staff in the clerk's office opens it and reviews it for completeness and correctness. Any problems are communicated by the clerk's office to a user by telephone.

Because the project is in the early stages of development, its consequences are not yet fully known. The institutional offices of criminal appellate defense attorneys and the Attorney General's Office are the primary users to date. Resources limit the potential for pro se litigants to use the system. Pro se litigants who are indigent and/or incarcerated are not likely to use the system. The court sees the potential benefits in reduced storage space and related costs. However, judges still rely on paper copies, although, in chambers, law clerks use documents in their electronic format because of the advantages of the cut-and-paste option available to them in preparing memoranda on cases. Obviously, continued implementation of the innovation is necessary for a determination of the precise net gains to the court, the bar, and the litigants.

In sum, the experiences in Tucson and North Carolina demonstrate the technical feasibility of electronic filing in state appellate courts. Their applications are sufficiently different in scope and court context to indicate that electronic filing is a flexible application of technology. Documentation of the consequences of these two innovative efforts should not only help each of the two courts refine their systems but should also help clarify the possible net gains that other courts might expect to receive.

4. *Summary.*—Technology is a tool to enhance efficiency in the resolution of appellate cases. Management information systems, issue tracking, and

electronic filing are pertinent areas of application. Each offers a different set of problems and prospects for success. Yet, beyond the possible gains in efficiency, these technologies should be seen as an opportunity for courts to take stock of existing practices.

Because a unique contribution of technology is the capacity to process large bodies of information in a large number of cases in a quick and programmed manner, technological innovation promises to reduce inadvertent delay caused by forgetfulness, omission, and oversight. Delay because cases have fallen through the cracks is possible in every appellate court. Even in the smallest courts, the current inventory and recent court decisions number in the thousands and stretch the human capacity to record, store, manage, and resolve cases quickly and accurately.

As a result, every appellate court should look at its existing policies, procedures, and practices in light of these technologies and ask how can it improve its current system. Do we really know what our cases look like? To what extent do we group cases by issues? If not, why not? Exactly what are the characteristics that shape the timeliness of resolution? Do we have information available that can answer that question? How many paper copies do we now require? Are they all necessary? What can be done to reduce unnecessary duplication? Undertaking such an assessment of existing system operations is likely to result in improving day-to-day practices and overall efficiency of the appellate process even if, upon reflection, introduction of a particular technological application is not deemed to be suitable.

Appendix B A Catalog of Appellate Caseflow Improvement Mechanisms

Following a previous revision of the American Bar Association's appellate time standards in 1988,¹ a 1990 ABA-sponsored project report entitled *Delay on Appeal* turned its attention toward prescribing change methodology for identifying specific causes and cures to meet the needs of individual appellate courts.² The project sponsored two workshops for judges and staffs of eight different appellate courts (four courts attended each workshop) to spur the establishment of backlog and delay reduction programs. Its report contains a catalog of mechanisms used by different courts at that time, eschewing evaluation of the effectiveness of any particular technique, but enunciating some basic principles:

Delay reduction methods should assist the court in controlling the caseflow from the time the appeal is initiated until it is concluded. Unnecessarily intricate procedures need to be simplified so that the time and effort devoted to monitoring control points is minimized. The court should assume responsibility for identifying cases that do not require full appellate treatment and process those cases differently. Likewise, administrative and judicial functions need to be distinguished so that judge time is properly apportioned to matters requiring judicial discretion and expertise.³

The mechanisms and techniques discussed in *Delay on Appeal* cover the gamut of appellate court innovations proposed and implemented during the 1970s and 1980s:

- screening by use of information statements;
- differentiated procedures, such as:
 - multiple-track programs,
 - accelerated docketing, and
 - motions on the merits;
- scheduling orders;
- trial court liaisons;
- manuals and forms;
- training programs;
- appendices;
- court reporting methods including:
 - electronic sound recording,
 - computer-assisted transcription, and
 - video recording;

1. JUDICIAL ADMIN. DIV., AM. BAR ASS'N, STANDARDS RELATING TO APPELLATE DELAY REDUCTION (1988).

2. See RITA M. NOVAK & DOUGLAS K. SOMERLOT, DELAY ON APPEAL (1990).

3. *Id.* at 93-94.

- transcript management through centralized control and sanctions;
- record limitations;
- electronic filings;
- attention to lawyer functions, including:
 - for-cause extensions,
 - prehearing conferences,
 - selective briefing, abbreviated briefs or submissions, and restricted numbers of briefs;
 - law office case management,
 - coordination with institutional lawyers;
- changes in judicial functions, including:
 - staff assistants,
 - eliminating or restricting oral argument,
 - expanded oral argument,
 - improving argument calendars,
 - memorandum decisions,
 - monitoring opinion production,
 - word processing and electronic mail;
- structural adjustments, such as:
 - adding judges,
 - adding legal staff,
 - creating intermediate appellate courts,
 - modifying jurisdiction,
 - unified review of criminal appeals,
 - plea bargains on appeals, and
 - disincentives to appeal.

A separate set of mechanisms was outlined for use in reducing backlog. Many of the techniques listed were identical, but some additional ones were:

- docket review;
- temporary judges;
- appellate magistrates or commissioners;
- modifying assignment procedures;
- creating special panels, and
- expanding argument calendars and opinion-writing goals.

Many of these ideas for improving appellate court caseflow management have been around for some time. Almost every one is being used in one or more of the six courts studied in this project. Nevertheless, not enough is truly known about just how effective many particular mechanisms have proven to be in speeding the flow of cases, except for the specific findings on the processes employed by courts included in Martin and Prescott's seven-court study⁴ or

4. See JOHN A. MARTIN & ELIZABETH PRESCOTT, *APPELLATE COURT DELAY* (Michael J. Hudson ed., 1981).

Chapper and Hanson's four-court examination.⁵ It is possible that the most significant potential for delay reduction is offered by yet another set of mechanisms: education of judges in case processing, combined with efforts to absorb new judges into the court's case processing culture.

5. See JOY A. CHAPPER & ROGER A. HANSON, NAT'L CTR. FOR STATE COURTS, INTERMEDIATE COURTS: IMPROVING CASE PROCESSING (1990).

Appendix C

Appellate Court Caseflow Management Self-Assessment Questionnaire

The Self-Assessment Questionnaire contained in this Appendix is designed to be used in two ways: as a stand-alone instrument that enables leaders of an appellate court to undertake a swift assessment of the court's caseflow management system; and as an adjunct to an independently conducted study of appellate case processing in a jurisdiction.

The Self-Assessment Questionnaire contains a total of sixty-six questions, each focused on actions or attitudes that reflect the court's level of performance in relation to one of the ten key elements of sound appellate caseflow management discussed in Section B of Part IV. Each question is scaled, allowing responses between 1 (low) and 5 (high) on the court's performance with respect to the subject matter of the question. There are at least five questions relating to each of the key elements.

Once a questionnaire has been completed, it can be self-scored, using the *Questionnaire Scoring Sheet* that follows question 66, and the results can easily be graphed using the form that accompanies the scoring sheet. As a stand-alone diagnostic instrument, the questionnaire can be useful in giving an individual appellate judge or clerk a good overall sense of the strengths and weaknesses of the court. However, the Self-Assessment Questionnaire can be even more valuable in getting an accurate picture of strengths and weaknesses if a number of different practitioners are involved in the process. Having a number of different individuals participate in a court's self-assessment process also makes it possible to learn the extent to which the perceptions of different practitioners diverge on particular topics. It can be very useful, for example, for judges, clerk's office staff, and appellate staff attorneys to compare the results of their assessments, noting areas where there is consensus on problems that need to be addressed and discussing the reasons why their responses to some questions may differ.

If an independent study of an appellate court is being conducted, it will be useful to have judges and staff complete the questionnaire as part of the preparation for a site visit by the study team. If study team members can review the responses to the questionnaire prior to conducting on-site interviews, they should be able to focus their interviews and other data collection efforts much more effectively. Additionally, of course, the results provide a data base that will be helpful in the study team's analysis of the situation in the jurisdiction with respect to appellate caseflow management.

Finally, even if no one in the appellate court completes the Self-Assessment Questionnaire, it can still be a very useful tool for studying appellate case processing in a jurisdiction. Members of a study team can use it to help shape questions for on-site interviews and, in the analysis phase, to help assess the court's performance in relation to key elements of sound appellate caseflow management.

Instructions: Score the court on each question. If you are uncertain, use your best estimate. If you are assessing caseload management in a division of the court, make appropriate modifications in the wording of the questions. After completing this form, transfer your scores to the scoring sheet. Then plot the results on the assessment graph.

1. The court has adopted time standards that establish expected outside time limits on case-processing time from the filing of the notice of appeal to the disposition of the appeal for major categories of cases.

1	2	3	4	5
No standards or guidelines		Informal guidelines exist		Yes—written guidelines adopted and published

- 2 All judges regularly receive management information reports that enable them to know the number of pending cases in the court; the distribution of these cases by age since argument or submission; and the status of each case.

1	2	3	4	5
No		Some information		Yes—all of this information is regularly provided (at least monthly)

3. When new appellate caseload management programs or procedures are being considered, the court's leaders consult with leaders of the bar and of other organizations that may be affected (e.g., prosecutor, public defender, and trial courts).

1	2	3	4	5
No		Sometimes		Yes, as a standard policy

4. The appellate court *both* takes responsibility for cases *and* counts every case as pending from the date that the notice of appeal or similar initiating petition for review is first filed.

1	2	3	4	5
No		Some categories of cases		Yes

5. The chief judge of the court has endorsed the court's (or the ABA's) case-processing time standards.

1	2	3	4	5
No		Quiet support within the court		Yes, publicly and emphatically

6. There is a commonly shared commitment, on the part of the judges, to the principle that the court has responsibility for ensuring expeditious case processing.

1	2	3	4	5
No shared judges commitment		Some judges are committed		Virtually all are committed

7. Members of the judges' support staffs (law clerks, judges' secretaries, and central staff counsel) are knowledgeable about caseload management principles and techniques, and use them in helping to manage caseloads and individual cases.

1	2	3	4	5
No		Some		Yes—virtually all are knowledgeable and use the principles and techniques

8. The court regularly conducts training on caseload management principles and techniques for judges and staff.

1	2	3	4	5
No training		Some training; conducted irregularly		Yes

9. The court has established, and uses, a system for evaluating the effectiveness of judges in managing the cases for which they are assigned primary decisional responsibility.

1	2	3	4	5
No		Some criteria exist		Yes

10. The court has few or no cases pending for more than the maximum length of time established by its own case-processing time standards or, alternatively, the ABA case-processing standards.

1	2	3	4	5
Don't know	Many cases are older than the court's (or ABA's)	About 30% are older	10-15% are over the standards	No cases or a few are over the standards

11. There are published policies and procedures governing the caseload process, readily available to judges, the court's staff, and bar members.

1	2	3	4	5
No		Exist for some areas		Yes, covering all major caseload issues/areas

12. The chief judge plays a leading role in initiating caseload management improvements in the court.

1	2	3	4	5
No		Sometimes		Yes

13. The appellate court appoints counsel rapidly upon receipt of a notice of appeal or other document indicating that a criminal defendant is indigent.

1	2	3	4	5
Rarely or never		Sometimes		Always

14. Electronic transmission of trial court records and of motions and briefs on the appeal is used by the appellate court.

1	2	3	4	5
No		For some purposes		Yes

15. The appellate court exercises supervisory responsibility over preparation of the record, rules promptly on issues involving designation of the record, and requires designations to be filed with the appellate court as well as with the trial court.

1	2	3	4	5
No		Exercises some oversight		Yes

16. The appellate court has established a procedure for use in simple cases that provides for accelerated filing of the record and similar procedures regarding speedy briefing and decision in these cases.

1	2	3	4	5
No		Has established limited special process for some types of cases		Yes

17. The appellate court supervises transcript preparation, including establishing rules, assuring expeditious payment to the transcript preparer, and requiring the filing of an ordering statement in the appellate court.

1	2	3	4	5
No		Uses some of these supervisory techniques		Yes

18. Assess the difficulty an attorney has in obtaining a continuance of the due date for filing the brief.

1	2	3	4	5
Easily obtainable upon request or stipulation		Attorney must show cause, but request is usually granted		Can be obtained only on written motion showing substantial cause

19. Judicial support staff or clerk’s office staff notify judges of cases that have been pending for long periods of time and cases in which there have been repeated continuances.

1	2	3	4	5
No		Some		Yes

20. Judges attend national or in-state seminars on appellate caseflow management and related topics.

1	2	3	4	5
No		Some judges attend, no standard court policy		Yes—all judges are expected to attend sessions periodically

21. Judges who do an effective job of managing those cases for which they are responsible are publicly recognized for excellent performance.

1	2	3	4	5
No		Sometimes		Yes

22. The court disposes of at least as many cases as are filed each year, in each general category of cases.

1	2	3	4	5
No—filings consistently exceed dispositions		Some years, in some categories of cases		Yes, consistently

23. The court’s staff at all levels are aware of the court’s case-processing time standards and other caseflow management goals.

1	2	3	4	5
There are no goals		Some are aware		Yes
			Top staff are aware	

24. The court encourages use of technology by accepting computer-generated briefs, including those with HTML links, and promoting use of advanced methods for rapidly preparing trial court transcripts.

1	2	3	4	5
No		Has used some new technologies		Embraces full range of advanced technology

25. The court has a process for screening cases for assignment to different appellate processing tracks.

1	2	3	4	5
No screening process		Some differentiated treatment		Multi-track

26. Judges' commitment to effective caseload management is demonstrated by their actions in holding lawyers to schedules, limiting continuances to situations in which good cause is shown, and allowing continuances only for short intervals.

1	2	3	4	5
Generally, no		Inconsistent		Generally, yes

27. The system of scheduling cases for briefing and argument provides attorneys and the court with certainty that a case will be argued or submitted shortly after the briefs are filed.

1	2	3	4	5
Rarely	Less than half of the time	50-70% of the time	70-90% of the time	90-100% of the time

28. The court has a central staff unit that regularly monitors the caseload, identifies problems (e.g., pending caseload increasing or certain cases taking unduly long), and recommends action to the chief judge or other judge with administrative responsibility.

1	2	3	4	5
No		Some central staff monitoring; occasional recommendations		Yes

29. The court has time standards/guidelines governing the time interval between each major stage in the appellate litigation process and enforces rules governing timely submission of papers and briefs.

1	2	3	4	5
No	Guidelines cover some but not all intervals			Yes

30. The court has a standard orientation program for new judges and new staff members in which the court’s policies and expectations regarding caseflow management and timely case processing are covered thoroughly.

1	2	3	4	5
No	Some orientation			Yes, thorough orientation

31. The court decides motions quickly so that the basic schedule for considering a case is not delayed by motions being filed.

1	2	3	4	5
No	Has some system to expedite motions			Processes motions swiftly

32. Any judge on a panel assigned a case may place a case screened for summary treatment on a calendar for full argument and consideration.

1	2	3	4	5
No	Judge may recommend, but court decides			Yes

33. The chief judge is widely regarded—by judges, staff, the bar, and others—as actively committed to reducing delays and implementing effective appellate caseflow management procedures.

1	2	3	4	5
No	Mixed perceptions			Yes

34. The court’s caseflow management goals and its performance in relation to the goals are subjects of regular communication with the bar and media.

1	2	3	4	5
No	Sporadic communication			Yes

35. The court regularly produces reports that show trends in filings, dispositions, pending caseloads, and case-processing times.

1	2	3	4	5
No	Some trend analysis			Yes—regular analysis of trends in all these areas

36. The judges discuss the status of the caseload and other caseflow management issues at regularly-held judges' meetings.

1	2	3	4	5
No	Sometimes			Yes

37. Consultation with attorneys, by a judge or court staff member, occurs early in a case to set deadlines for completion of stages of the case.

1	2	3	4	5
No	Only if requested by attorney	Sometimes	Mainly in complex cases	Yes, in all cases

38. The judges recognize the need to monitor the pace of litigation and are actively committed to seeing the court meet standards for expeditious case processing.

1	2	3	4	5
No	Some judges recognize the need			Yes

39. Judges' support staffs and clerk's office staff help in achieving the court's goals (e.g., in contacts with attorneys, including scheduling cases for argument dates).

1	2	3	4	5
No	Some			Yes

40. The court regularly conducts training sessions for practicing lawyers (especially young lawyers) to familiarize them with the court's caseflow management policies, procedures, and expectations.

1	2	3	4	5
No	Some training, conducted irregularly			Yes

41. Judges who have administrative responsibility meet with the judges in their panels or divisions to review the status of pending caseloads and discuss ways of dealing with common problems.

1	2	3	4	5
No		Occasionally		Yes, at least monthly

42. The court regularly produces management information reports that enable judges and staff to assess the court’s progress in relation to its caseload management goals.

1	2	3	4	5
No		Information available on some goals		Yes

43. Mechanisms for obtaining the suggestions of court staff about caseload management problems and potential improvements exist and are used by the court’s leaders.

1	2	3	4	5
No		Occasionally		Yes

44. Attorneys file briefs on or before the scheduled due date for their brief and are ready to proceed on the argument date.

1	2	3	4	5
Rarely	Less than half the time	50-70% of the time	70-90% of the time	90-100% of the time

45. Judges whose performance, in cases which they have been assigned for opinion preparation, is below acceptable standards are assisted and receive negative sanctions if their performance does not improve.

1	2	3	4	5
No		Sometimes		Yes

46. The court follows established procedures to identify inactive cases and dispose of them.

1	2	3	4	5
No		Occasional reviews and purges of inactive		Yes—regular are done and “purge” procedures are followed

47. The court administrator or clerk of court is widely regarded—by judges, staff, and others—as knowledgeable about appellate caseflow management principles and practices, familiar with the court’s caseload situation, and effective in recommending and implementing policy changes.

1	2	3	4	5
No	Mixed perceptions			Yes

48. The time required to complete case processing is generally within the time standards adopted by the court or (if no standards have been adopted by the court) does not exceed the ABA case-processing time standards.

1	2	3	4	5
Don’t know	Many cases over standards	Fair performance in relation to standards	Good performance; some improvement desirable	Yes—the court is consistently within the standards

49. Techniques for avoiding or minimizing attorney schedule conflicts are part of the scheduling system, and attorneys’ schedules are accommodated to the extent reasonably possible.

1	2	3	4	5
Attorney	Some techniques are used; system could be improved on some goals		Techniques are used and work well; no improvement needed	

50. The judges transmit drafts of opinions and decisions electronically among themselves to expedite the decisional process.

1	2	3	4	5
No electronic capability	Some use of network to send drafts		Almost always	

51. Senior staff members regularly meet with judges in leadership positions to discuss caseload status and develop plans for addressing specific problems.

1	2	3	4	5
No	Occasionally			Yes

52. Judges with administrative responsibility review information on the caseflow management performance of judges in the court (or in their divisions), give public recognition to those doing an outstanding job, and meet with those whose performance is subpar to discuss improvements

1	2	3	4	5
No		Sometimes		Yes

53. The court has adopted goals for the time within which ready cases are argued or submitted.

1	2	3	4	5
No		Informal expectations exist		Yes

54. Key management information reports are widely distributed to judges and staff, and include short written analyses that highlight problems and issues.

1	2	3	4	5
No		Limited distribution and little analysis		Yes

55. The court provides information about its caseflow management goals and about its performance in relation to these goals to the media on a regular basis.

1	2	3	4	5
No		Occasionally		Yes, regularly

56. Simple cases that may be amenable to swift disposition are identified at an early stage for special processing.

1	2	3	4	5
Never	Rarely	Some—mainly if counsel requests	Some categories of cases	Yes, routinely

57. Court staff members attend national or in-state seminars on caseflow management and related topics.

1	2	3	4	5
No		Some staff members have such training		Yes—virtually all staff members periodically receive such training

58. The court has established goals for the maximum size of its pending caseload(s) and has developed plans for reducing its caseload to that number (or, if the current caseload is at an acceptable size, for ensuring that the caseload does not exceed the goal that has been set).

1	2	3	4	5
No	Some goals exist; status of plans unclear			Yes

59. The chief judge and clerk/court administrator regularly meet to review caseload status, discuss policy and operational problems affecting caseload management, and develop specific policies and plans.

1	2	3	4	5
Rarely or never	Irregularly			Yes, at least once a week

60. How frequently are cases that are ready to be scheduled for argument or submission delayed because there are more ready cases than can be reached on the schedule dates available?

1	2	3	4	5
Very frequently	Frequently	Occasionally	Rarely	Never

61. Staff members who do an effective job of managing caseloads for which they are responsible are publicly recognized by the court's leaders for their good performance.

1	2	3	4	5
No	Sometimes			Yes

62. The appellate court requires that a copy of the notice of appeal or similar initiating document be filed with the appellate court at the same time it is filed in the trial court.

1	2	3	4	5
No	Sometimes			Yes

63. Every pending case on the court’s docket has a “next action” date scheduled, including a decision date within the goals set by the court.

1	2	3	4	5
Most cases do not have next action date scheduled	Approximately 10-20% of cases have no next action date scheduled	Approximately 20-40% of cases have no next action date scheduled	Almost all cases have a next action date scheduled	Yes

64. The court has adopted goals for the time within which opinions are prepared by the judge responsible for the opinion.

1	2	3	4	5
No	Informal expectations exist			Yes

65. Judges consistently prepare opinions in cases within the time period set by the court’s standards or, if no standards covering the opinion preparation stage have been adopted, within 45 days in simple cases and 90 days in all cases.

1	2	3	4	5
No standards and many opinions		Some opinions are prepared quickly but a significant number take many months		Yes—time standards exist and are met consistently

66. The following caseflow management information is readily available and regularly used.

(Y = Yes; N = No)

<u>Available</u>	<u>Used</u>	<u>Information</u>
_____	_____	Number of pending cases, by case type
_____	_____	Age of pending cases (frequent distribution, within age categories)
_____	_____	Change (number and age) in pending cases from last report
_____	_____	Age of pending caseload compared to time standards
_____	_____	Age of cases at disposition, by case type
_____	_____	Percentage of briefs filed on first scheduled due date
_____	_____	Number of continuances of scheduled events in each case
_____	_____	Reasons for each continuance
_____	_____	Number and proportion of dispositions by type of disposition
_____	_____	Annual filings and dispositions, by case type

To score this question, add the number of Y’s in the “Available” and “Used” columns, and divide the total (____) by 4. RESULT: _____

Appellate Caseflow Management Self-Assessment Questionnaire

Questionnaire Scoring Sheet

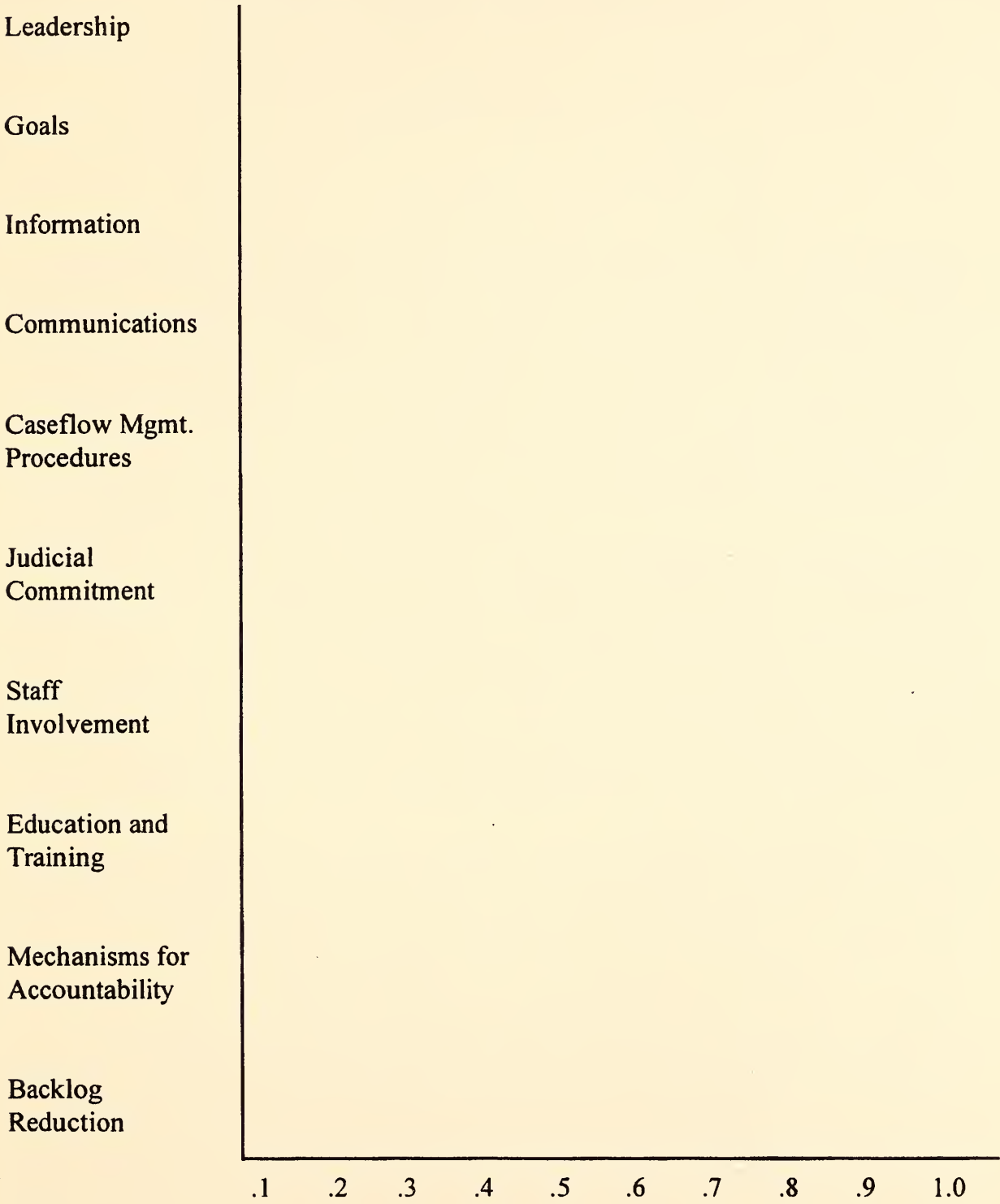
Instructions: Record the score for each question in the appropriate space below

Leadership	Goals	Information	Communications	Caseflow Management Procedures
5.	1.	2.	3.	4.
12.	23.	14.	11.	13.
33.	29.	24.	36.	15.
41.	34.	35.	37.	16.
47.	48.	42.	43.	17.
52.	53.	50.	55.	25.
59.	64.	54	62.	27.
		66.		44.
				49.
				56.
				60.
				62.
TOTAL= _____ Out of 35 possible, Divide total by 35: SCORE _____	TOTAL= _____ Out of 35 possible, Divide total by 35: SCORE _____	TOTAL= _____ Out of 40 possible, Divide total by 40: SCORE _____	TOTAL= _____ Out of 35 possible, Divide total by 35: SCORE _____	TOTAL= _____ Out of 60 possible, Divide total by 60: SCORE _____
Judicial Commitment	Staff Involvement	Education and Training	Mechanisms for Accountability	Backlog Reduction/ Inventory Control
6.	7.	8.	9.	10.
18.	19.	20.	21.	22.
26.	28.	30.	31.	46.
38.	39.	40.	32.	58.
65.	51.	57.	45.	63.
			61.	
TOTAL= _____ Out of 25 possible, Divide total by 25: SCORE _____	TOTAL= _____ Out of 25 possible, Divide total by 25: SCORE _____	TOTAL= _____ Out of 25 possible, Divide total by 25: SCORE _____	TOTAL= _____ Out of 30 possible, Divide total by 30: SCORE _____	TOTAL= _____ Out of 25 possible, Divide total by 25: SCORE _____

Appellate Caseflow Management Self-Assessment Questionnaire

Graph of Self-Assessment Questionnaire Results

Instructions: Using the scores recorded on the Questionnaire Scoring Sheet, plot the final score for each dimension on the graph below.



LECTURE

INTERNATIONAL CODES OF RESEARCH ETHICS: CURRENT CONTROVERSIES AND THE FUTURE*

ROBERT J. LEVINE**

INTRODUCTION

In the past decade, there has been a striking increase in interest in conducting multinational clinical trials. Most of this interest has been connected directly to the AIDS pandemic. Effective methods are needed urgently to treat patients who are already infected with HIV and to reduce the incidence of new infections.

Most of the clinical trials designed to deal with the AIDS problems in resource poor countries are at least partially supported and carried out by sponsors and investigators from the industrialized countries. These trials necessarily are conducted in the resource poor countries with the inhabitants of these countries serving as research subjects.

Research involving human subjects must be conducted in compliance with legal and ethical standards. The recent increase in multinational collaborations has forced us to recognize that standards developed in the industrialized nations may not be applicable in the resource poor nations. This recognition, in turn, has generated a high level of interest in developing international codes of ethics that are applicable to all regions in the world. A by-product of this project has been a growing recognition that the existing codes of ethics each has serious flaws that limit its applicability in low resource countries as well as in those that are wealthy.

It is often said that the AIDS pandemic has presented us with novel ethical problems that make it necessary to revise ethical codes and regulations for the protection of the rights and welfare of human research subjects. I disagree. I

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believe that most of the “novel” problems presented by AIDS have been there all along. There are social and political features of the AIDS pandemic that have forced us to pay attention to problems that should have been addressed long ago.¹

Since World War II, three major international codes of research ethics have been developed; these are the *Nuremberg Code*, the World Medical Association’s *Declaration of Helsinki*² and the Council of International Organizations of Medical Science’s *International Ethical Guidelines for Biomedical Research Involving Human Subjects*.³ A full discussion of each of these documents and their relation to each other is beyond the scope of this Article.⁴ In this Article, I will concentrate on the *Declaration of Helsinki* because most critics of multinational clinical trials base their criticism on interpretations of this document.

I. THE *DECLARATION OF HELSINKI*

The *Declaration of Helsinki* was first promulgated by the World Medical Association (WMA) at its meeting in Helsinki, Finland in 1964; subsequently it has been amended several times.⁵ I believe that the *Declaration* urgently requires revision.⁶ I shall discuss the two most important reasons for my holding this belief. First, the *Declaration* is an illogical document. It categorizes all research as either “therapeutic” or “non-therapeutic”; every document that relies on this distinction contains errors—errors that are not intended by their authors and that when exposed, often embarrass their authors. I shall provide some examples of such errors. Second, the *Declaration* is seriously out of touch with contemporary ethical thinking. For example, it takes an unnecessarily rigid stance against placebo controlled clinical trials. Because of such errors, the *Declaration* is widely disregarded. Investigators in every academic medical center in the United States routinely do research that violates the standards established by the *Declaration*. This widespread and routine disregard for the *Declaration* undermines its authority and credibility.

Some commentators on the fifth edition of the *Declaration of Helsinki*

1. See Robert J. Levine, *The Impact of HIV Infection on Society’s Perception of Clinical Trials*, 4 KENNEDY INST. OF ETHICS J. 93, 93-98 (1994).

2. WORLD MEDICAL ASS’N, *DECLARATION OF HELSINKI: ETHICAL PRINCIPLES FOR MEDICAL RESEARCH INVOLVING HUMAN SUBJECTS* (1964) (amended 1975, 1983, 1989, 1996, & 2000), <http://www.wma.net/e/policy/17c.pdf>.

3. COUNCIL FOR INTERNATIONAL ORGANIZATIONS OF MEDICAL SCIENCES, *INTERNATIONAL ETHICAL GUIDELINES FOR BIOMEDICAL RESEARCH INVOLVING HUMAN SUBJECTS* (1993).

4. For a more complete discussion of these documents, see Robert J. Levine, *International Codes and Guidelines for Research Ethics: A Critical Appraisal*, in *THE ETHICS OF RESEARCH INVOLVING HUMAN SUBJECTS: FACING THE 21ST CENTURY* 235-59 (H.Y. Vanderpool, ed. 1996).

5. See WORLD MEDICAL ASS’N, *supra* note 2; COUNCIL FOR INTERNATIONAL ORGANIZATIONS OF MEDICAL SCIENCES, *supra* note 3.

6. See Robert J. Levine, *The Need to Revise the Declaration of Helsinki*, 341 NEW ENG. J. MED. 531, 531-34 (1999).

(*Helsinki V*) stated that some of its requirements—particularly with regard to the use of placebo controls in clinical trials—were misunderstood because they were unclear. According to such commentators, a major reason for revising the *Declaration* would be to clarify the meanings that were intended by the authors.

The *Declaration of Helsinki* has recently been revised extensively; the primary purposes of this revision were to address and resolve the aforementioned problems. The current version was promulgated by the WMA in Edinburgh, Scotland in October 2000.⁷ In this Article, I will first consider the problems presented by *Helsinki V*.⁸ Then I will consider the revisions embodied in the most recent, sixth edition (*Helsinki VI*), concentrating on those revisions that were designed to correct the problems I have identified. This appraisal leads to the conclusion that the revisions retain the errors of *Helsinki V*; *Helsinki*'s position on placebo controls is essentially unchanged and, while the revision removed the language of "therapeutic" and "non-therapeutic" research, the document still relies on this distinction and retains its associated errors.

II. THERAPEUTIC AND NON-THERAPEUTIC RESEARCH

First, let us consider the distinction between therapeutic and non-therapeutic research. Section II of the *Helsinki V* sets forth the guidelines developed for therapeutic research; Section III is concerned with non-therapeutic research. Putting one article from Section II in immediate proximity to one from Section III helps elucidate the logical flaw:

II.6 The doctor can combine medical research with professional care . . . only to the extent that . . . research is justified by its potential diagnostic or therapeutic value for the patient.

III.2 The subjects should be volunteers—either healthy persons or patients for whom the experimental design is not related to the patient's illness.

Let us consider what is ruled out by this pair of articles. They rule out all research in the fields of pathogenesis, pathophysiology, and epidemiology. Consider, for example, a recently published study that examines the role of neurotransmitters in the pathogenesis of mental depression. This study was non-therapeutic. It certainly could not be justified in terms of its potential diagnostic or therapeutic benefit to the patient. Therefore, according to the *Declaration*, it could only be done on normal volunteers or on patients who have some disease other than depression. This is what I mean by illogical and embarrassing.

The problems in the category of therapeutic research are equally troubling. The concept of therapeutic research is incoherent. At least some of the components of every research protocol are non-therapeutic; when they are all

7. See WORLD MEDICAL ASS'N, *supra* note 2.

8. See *id.* The fifth edition was promulgated by the WMA in Somerset West, Republic of South Africa in October 1996. *Id.*

non-therapeutic, use of the term “non-therapeutic research” might be justified. Every clinical trial has some components that are non-therapeutic. When we evaluate entire protocols as either therapeutic or non-therapeutic, as required by the *Declaration of Helsinki*, we end up with what I call the “fallacy of the package deal.” Those who use this distinction typically classify as “therapeutic research” any protocol that includes one or more components that are intended to be therapeutic; therefore, the non-therapeutic components of the protocol are justified improperly according to the more permissive standards developed for therapeutic research.

Such erroneous justifications in the recent past have been frequent. In trials of thrombolytic therapy, repeated coronary angiograms have been performed on patients who had clinical indications for only one. Liver biopsies have been performed for no reason other than to disguise treatment assignments in a double-blind placebo-controlled trial. Repeated endoscopies have been performed in a population of patients with peptic ulcers who had clinical indications for no more than one. Placebos have been administered by way of a catheter inserted in the coronary artery. I do not want to be misunderstood as saying that any of these procedures were unethical. I am simply arguing that they should not be justified according to standards developed for “therapeutic research.”

These examples illustrate the necessity of a vocabulary that enables the evaluation of these components of research. The United States and Canada, each recognizing the problems caused by the distinction between therapeutic and non-therapeutic research, purged these concepts from their regulations and guidelines in the 1970s. In the United States, in response to the recommendations of the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research (National Commission), federal regulations were revised in the early 1980s to classify interventions and procedures—not entire protocols—as either beneficial or not.⁹ In the language of the regulations for research involving children, interventions or procedures are classified as either those that “hold out the prospect of direct benefit,” or those that do not hold out such a prospect.¹⁰ They are referred to in the regulations as either beneficial or non-beneficial. The justification of beneficial procedures is similar in principle to that employed in the practice of medicine. The intervention or procedure must hold out for the individual patient-subject the prospect of an improvement in his or her health. Moreover, in most cases there should be no other therapeutic procedure known to be superior to that of those being evaluated. There is no ceiling imposed on the degree of risk that may be imposed in the pursuit of therapeutic benefit—only that it must be reasonable in relation to the anticipated benefits.¹¹

Obviously, non-therapeutic procedures cannot be justified in terms of their

9. See Robert J. Levine, *Clarifying the Concepts of Research Ethics*, 9 HASTINGS CENTER REP., June 1979, at 21-26; see also ROBERT J. LEVINE, *ETHICS AND REGULATION OF CLINICAL RESEARCH* (2d ed. 1988) [hereinafter LEVINE, *ETHICS AND REGULATION*].

10. 45 C.F.R. § 46.405-406 (2001).

11. See 45 C.F.R. § 46.11(a)(2); LEVINE, *ETHICS AND REGULATION*, *supra* note 9.

expected benefit for the patient-subject. They must be justified instead by the benefits one hopes to produce for society. The amount of risk that may be presented to vulnerable subjects by non-beneficial procedures is limited by the so-called threshold standards in the regulations. For example, for research involving children, non-beneficial interventions or procedures that present no more than minimal risk may be employed without special justification. Interventions and procedures that present only “a minor increase over minimal risk” must be justified on grounds that the procedure itself “is likely to yield . . . knowledge . . . which is of vital importance for the understanding or amelioration of the subjects’ disorder or condition,”¹² and “[t]he intervention or procedure presents experiences to subjects that are reasonably commensurate with those inherent in [the subjects’] actual or expected medical . . . situations.”¹³ Interventions or procedures that present more than a minor increase over minimal risk must be reviewed and approved at the national level.¹⁴

III. BEST PROVEN THERAPEUTIC METHOD STANDARD

As I mentioned at the outset, the *Declaration of Helsinki* not only has logical flaws, it is also out of touch with contemporary ethical thinking. This will be illustrated by considering Article II.3 of *Helsinki V*.

II.3 In any medical study, every patient—including those of a control group, if any—should be assured of the best proven diagnostic and therapeutic method. This does not exclude the use of inert placebo in studies where no proven diagnostic or therapeutic method exists.

Let us consider the implications of this article. This article would rule out the development of all new therapies for conditions for which there are already existing “proven” therapies. One cannot evaluate a new therapy unless one withholds those that have already been demonstrated safe and effective for the same indication. Strict application of this standard would have prevented the evaluation of the effectiveness of cimetidine and other H₂ receptor antagonists for the treatment of peptic ulcer because the withholding of belladonna and its derivatives would have been considered an unethical withholding of the “best proven therapeutic method.” Similarly, the development of new and improved antihypertensive drugs would have ceased with the establishment of the ganglionic blockers. This is also what I mean by embarrassing.

Article II.3 also forbids placebo controls in clinical trials in which there are virtually no risks from withholding proven therapy. Consider research in the field of analgesics and antihistamines. No experienced person would ever recommend that you are required to have an active control in the evaluation of a new analgesic. Article II.3 also rules out the use of placebo controls in clinical trials in which there are very remote possibilities of adverse consequences of

12. 45 C.F.R. § 46.406(c).

13. 45 C.F.R. § 46.406(b).

14. 45 C.F.R. § 46.407(b).

withholding the active drug, such as trials of new antihypertensives and of new oral hypoglycemic agents. Insisting on active controls in these areas would introduce major inefficiencies in the research enterprise without any compensating benefit; the amount of injury to research subjects that would be prevented by requiring active controls is so small that it can be, and generally is, considered negligible.

Placebo controlled trials of analgesics, antihypertensives and oral hypoglycemics are conducted commonly and the results are published in medical journals. Incidentally, it is worth noticing that such publication is yet another routine violation of *Helsinki V*; Article I.8 holds that: "Reports of experimentation not in accordance with the principles laid down in this *Declaration* should not be accepted for publication."

Now let us turn to the most controversial interpretation of Article II.3, that it requires the provision of the best proven therapeutic method that is available in the industrialized countries, even when conducting research in countries in which such therapy is not available. This interpretation has provoked the most acrimonious debate in the field of research ethics since the 1970s. The debate began with an article in *The New England Journal of Medicine*, which denounced as unethical the clinical trials that were being carried out in certain developing countries to evaluate the effectiveness of the short duration regimen of AZT in preventing perinatal transmission of HIV infection.¹⁵ The editor of the *New England Journal* opined that these trials were, in certain respects, reminiscent of the notorious Tuskegee Syphilis Studies;¹⁶ this is, in contemporary American culture, one of the most powerful metaphors for symbolizing evil in the field of research ethics. The other side of the controversy is exemplified by a statement of a physician-researcher from Uganda, one of the countries in which the trials were conducted. He accused the editor of a form of "ethical imperialism," which asserts that the Western vision of research ethics must dominate the conduct of research everywhere in the world.

Let us consider these clinical trials in some detail as a case study. At the time the trial began, and indeed to this day, the standard in industrialized countries such as the United States is the so-called 076 regimen. The name comes from AIDS Clinical Trial Group (ACTG) protocol number 76 which established its safety and efficacy. The 076 regimen reduces perinatal transmission of HIV infection by about sixty-seven percent; the cost of the chemicals alone for treating each infected pregnant woman was about \$800 in 1997. Why, one might ask, can't we just provide the 076 regimen to women infected with HIV in the developing countries? First and foremost is the cost. Eight hundred dollars per woman is approximately eighty times the annual per capita health expenditure in many of the sub-Saharan African countries in which

15. Peter Lurie & Sidney Wolfe, *Unethical Trials of Interventions to Reduce Perinatal Transmission of the Human Immunodeficiency Virus in Developing Countries*, 337 NEW ENG. J. MED. 853, 853-56 (1997).

16. Marcia Angell, *The Ethics of Clinical Research in the Third World*, 337 NEW ENG. J. MED. 847, 847-49 (1997).

these trials were carried out. The cost of the chemicals is not the only problem; there are several other obstacles, most of which are also related to finances. I shall name some of the others.¹⁷

Provision of the 076 regimen would also have required a revision of the customs within the host countries for seeking perinatal care. In most of these countries, women simply do not consult a health care professional early enough in pregnancy to begin the regular 076 regimen. It would also have required intravenous administration of AZT during delivery; in most regions of the host countries, there are no facilities for the intravenous administration of anything. Finally, in the host countries for these trials, with the exception of Thailand, women breast feed their newborn babies even when they know they have HIV infection. The risk providing the babies with any available alternatives to breast feeding may be even greater than the risk of exposing them to HIV infection through breast feeding. The transmission rate of HIV infection by way of breast feeding is about fourteen percent. However, in the regions in which the "short-duration" regimen of AZT was evaluated, particularly in sub-Saharan Africa, the death rate from infant diarrheal syndromes is about four million per year. In these countries, there is no infant formula. We could make the infant formula available in these countries, but that would not help. One cannot mix the formula with the local water supply because it is contaminated with, among other things, the pathogens that cause the deadly infant diarrheal syndrome.

In summary, it is clear that the 076 regimen of AZT cannot be made available to most HIV-infected pregnant women in the resource poor countries now or in the foreseeable future. This is the main reason that it is essential to find methods to reduce the rate of perinatal transmission of HIV that are within the financial reach of the resource poor countries. Finding these methods was the primary justification for conducting the clinical trials of the short duration regimen of AZT. The cost of the AZT in this regimen was about ten percent of that of the 076 regimen. Moreover, there was no need for intravenous therapy or administration of the drug to the babies. At the time the trials began, it seemed likely that two of the countries could afford to provide the short duration regimen if it proved effective; there was also a commitment from international agencies to assist the other resource poor countries in securing and providing the drug.

Now let us consider whether the best proven therapeutic method standard for a clinical trial should be construed to mean the best therapy available anywhere in the world or the standard that prevails in the host country. Guidance on this point can be found in another document—the *International Ethical Guidelines for Biomedical Research Involving Human Subjects*—a document prepared by the Council of International Organizations of Medical Sciences (CIOMS) in collaboration with the World Health Organization (WHO).¹⁸ This document, which, unlike any other international document, explicitly addresses the

17. For a more complete discussion of these problems, see Robert J. Levine, *The "Best Proven Therapeutic Method" Standard in Clinical Trials in Technologically Developing Countries*, 20 IRB: A REVIEW OF HUMAN SUBJECTS RESEARCH, Jan./Feb. 1998, at 5-9.

18. COUNCIL FOR INTERNATIONAL ORGANIZATIONS OF MEDICAL SCIENCES, *supra* note 3.

problems of multinational research, offers some guidelines that I believe are far superior to informed consent and other traditional protections in preventing the exploitation of people in developing countries. First, for any research that is sponsored by an agency in an industrialized country and carried out in a developing country, the research goals must be responsive to the health needs and the priorities of the host country or community.¹⁹ Second, it requires that any product developed in the course of such research must be made reasonably available to the inhabitants of the host country.²⁰ This, then, focuses multinational research on the needs of the country in which the research is carried out. These provisions are designed to put a stop to the practice by some corporations of conducting phase one drug studies in Africa simply because it is less expensive and less vigorously regulated.

CIOMS also provides some commentary on the problem with the *Declaration of Helsinki*: "[T]he *Declaration* does not provide for controlled clinical trials."²¹ Rather, it assures the freedom of the physician "to use a new diagnostic and therapeutic measure, if in his or her judgment it offers hope of saving life, reestablishing health or alleviating suffering."²² Also in regard to phase two and phase three drug trials, there are customary and ethically justified exceptions to the requirements of the *Declaration of Helsinki*. A placebo given to a control group, for example, cannot be justified by its "potential diagnostic or therapeutic value for the patient, as Article II.6 prescribes"²³

In my analysis, the initiation of a research program cannot be considered the same as the establishment of an entitlement to the best therapy that is available anywhere in the world.²⁴ The relevant standard is the one that prevails in the host country.²⁵ I think it would be unethical to withhold anything that is generally available in the host country in order to do research designed to evaluate something else when such withholding could result in a non-trivial injury to the subject.

IV. THE HIGHEST ATTAINABLE AND SUSTAINABLE THERAPEUTIC METHOD

A new ethical standard is now emerging on the international research ethics scene. This standard is called the "highest attainable and sustainable therapeutic method" standard.²⁶ This ungainly name requires some explanation. "Highest attainable" means that under the circumstances of the clinical trial, the level of therapy one should provide should be the best one can do. The level of therapy that is generally available in the host country should not necessarily be

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* (Art. II.1).

23. *Id.*

24. See Levine, *supra* note 17.

25. *Id.*

26. *Id.*

considered sufficient; rather, it should be considered a minimum—the least that might be considered ethically acceptable.

“Sustainable” means a level of treatment that one can reasonably expect to be continued in the host country after the research program has been completed. It is a level of treatment that the host country can reasonably be expected to maintain relying only on its own resources when the extra resources provided by sponsors from industrialized countries are no longer available.

“Sustainability,” then, serves as a constraint on “highest attainable.” One should provide the highest level of therapy that one can under the circumstances of the clinical trial; however, one should keep in mind that if the level of therapy is not sustainable, the results of the trial may not be responsive to the needs and priorities of the host country and the therapeutic product developed in the research program may not be reasonably available to inhabitants of the host country. A very important consideration is that provision of a therapy that is not sustainable may distort the research setting to the extent that the results may not be applicable in the host country.

Those who insist that *Helsinki V* Article II.3 must be interpreted as requiring the provision of the best proven therapeutic method that is available in industrialized countries, even when research is carried out to address the needs of resource poor countries, must understand the implications of this position. To consider once again our case study—the trials of the “short-duration AZT regimen” in preventing perinatal transmission of HIV—most resource poor countries cannot even afford to purchase sufficient AZT to implement the best proven therapeutic method (that is, the 076 regimen). In order to truly provide the “best” it is also necessary to provide all of the other advantages that exist in industrialized countries that enable the 076 regimen to be effective. These include, among other things, infant formula as an alternative to breastfeeding, a water supply that is safe for infants, and the facilities for intravenous administration of drugs. All of these “advantages,” taken together would cost far more than the AZT. Clearly the cost of the 076 regimen is beyond the reach of most of the resource poor countries. Insistence on this standard would accomplish nothing other than to deny to resource poor countries the possibility of developing therapies and preventions that they can afford. Moreover, it would preclude the participation of sponsors and investigators from industrialized countries in research and development programs designed to assist the resource poor countries in developing affordable treatments and preventions.

Application of the “highest attainable and sustainable therapeutic method” standard is in all relevant respects a more suitable ethical standard. One of its chief advantages is that it tends to facilitate the efforts of resource poor countries to develop needed therapies and preventions that are within their financial reach. Until the imbalances in the distribution of wealth among the nations of the world are corrected, this appears to be the best we can do.

V. THE REVISIONS IN *HELSINKI VI*

As mentioned earlier, one of the major reasons for the most recent revision of *Helsinki VI* was to clarify its position on the ethical justification of placebo

controls. I find no reason to believe that *Helsinki V* was either equivocal or susceptible to differing interpretations. Now let us consider whether *Helsinki VI* changes any aspect of its position on placebo controls. The relevant new passage is Article 29, the replacement for Article II.3 in *Helsinki V*:

29. The benefits, risks, burdens and effectiveness of a new method should be tested against those of the best current prophylactic, diagnostic, and therapeutic methods. This does not exclude the use of placebo, or no treatment, in studies where no proven prophylactic, diagnostic or therapeutic method exists.²⁷

The only improvement over Article II.3 is the removal of the proscription of the development of all new therapies for conditions for which there are already existing “proven” therapies. And even this salutary effect is not entirely clear; it depends completely on the interpretation of the new Article 28. The *Declaration*’s absolute proscription remains intact for placebo controls in clinical trials designed to evaluate therapies for diseases or conditions for which there already exists a therapy known to be at least partially effective.

The other major reason for the revision of *Helsinki V* was to remove the spurious distinction between “therapeutic” and “non-therapeutic” research with all of its attendant problems. The WMA also failed in this regard. Although the language of “therapeutic” and “non-therapeutic” research has been removed from the document, the concept remains. There still is a section called “C. Additional Principles for Medical Research Combined with Medical Care.”²⁸ The first article in this section is:

28. The physician may combine medical research with medical care, only to the extent that the research is justified by its potential prophylactic, diagnostic or therapeutic value. When medical research is combined with medical care, additional standards apply to protect the patients who are research subjects.²⁹

As noted earlier, all research includes some components that are neither intended nor expected to be therapeutic. *Helsinki VI* persists in demanding that in “research combined with medical care,” the entire protocol must be justified in terms of its potential prophylactic, diagnostic or therapeutic value.³⁰ The door to the fallacy of the package deal remains wide open.

VI. IMPACT OF THE *HELSINKI* REVISION

The *Declaration of Helsinki* has been violated routinely by medical researchers ever since it was first promulgated in 1964. Researchers who think about the requirements of *Helsinki* have noticed that their colleagues do research,

27. WORLD MEDICAL ASS’N, *supra* note 2 (amended 2000).

28. *Id.* at 4.

29. *Id.*

30. *Id.*

for example, in the field of pathogenesis and use placebo controls in studies of new oral hypoglycemics. They have further noticed that these colleagues are not criticized as unethical. Rather, their research is rewarded by the traditional coins of the academic realm. The rewards include publication in respectable medical and scientific journals by editors who have proclaimed publicly their commitments to honor the *Declaration*. This includes its enjoinder against publication of reports of research conducted “not in accordance with [the *Declaration*’s] principles.”³¹ Recognition that some articles of *Helsinki* are both routinely violated and widely believed to be erroneous tends to undermine the credibility and authority of the entire document. Researchers who notice that virtually everyone violates Article III.2 of *Helsinki V* with impunity feel free to pick and choose among the other articles to see whether they wish to behave in accord with them.

The WMA deserves congratulations on the accomplishments reflected in *Helsinki VI*. Much language that was either faulty or archaic, or both, was replaced by more apposite wording. However, the two major flaws that provided the stimulus for this revision remain uncorrected: the distinction between therapeutic and non-therapeutic research and the excessively rigid proscription of placebo controls. I see no reason to suspect that the current iteration of these flawed articles in *Helsinki VI* will command any more respect than did their predecessors.

31. See WORLD MEDICAL ASS’N, *supra* note 2 (*Helsinki V*, Art. 1.8; *Helsinki VI*, Art. 27).

NOTES

CHOOSING LIFE: PROPOSING IMMUNITY FOR MOTHERS WHO ABANDON THEIR NEWBORNS

JILL M. ACKLIN*

INTRODUCTION

On January 26, 2000, a baby boy was discovered approximately 200 feet outside of Community North Hospital's entrance in Indianapolis, Indiana.¹ Doctors, unable to revive the baby's frozen body, declared the infant dead in the emergency room.² It appeared that someone had cared for the baby boy—he was wearing a piece of red felt as a diaper and a small gold angel pendant.³ Strangers who attended the newborn's funeral named him Baby Ephraim.⁴ Homicide investigators expressed outrage as the search for Baby Ephraim's mother began.⁵

* J.D. Candidate, 2002, Indiana University School of Law—Indianapolis; B.A., 1999, Butler University, Indianapolis, Indiana. Law clerk to the Honorable Jerry M. Barr, Hamilton Superior Court No. 2. All opinions are those of the author.

1. Kevin O'Neal & Bill McCleery, *Infant's Body Found Frozen in Hospital Lot*, INDIANAPOLIS STAR, Jan. 27, 2000, at A1.

2. *Id.*

3. Diana Penner, *Statute Aims to Protect Newborns From Harm*, INDIANAPOLIS STAR, June 19, 2000, at B1.

4. *Id.*

5. Two quotes from investigators for the Marion County Sheriff's Department demonstrate outrage towards the act and the mother. "I believe the baby was dropped here for whatever ridiculous, ludicrous reason," said Maj. Mike Turk, homicide investigator [with the Marion County Sheriff's Department]. "You just wonder how another human being could possibly do that." O'Neal & McCleery, *supra* note 1, at A1. Several days later, the following quote appeared in the same newspaper:

"It just blows my mind that anybody would do it," said [Detective Skip] Pollard [with the Marion County Sheriff's Department], a father of two and grandfather of three.

"When you're standing there in that emergency room looking at that baby, your first urge is to go out and choke somebody."

Stephen Beaven, *Frustration Rises in Effort to Identify Baby Left to Freeze*, INDIANAPOLIS STAR, Feb. 1, 2000, at A1. Police in other states have also expressed outrage at similar incidents. One Arizona police officer, in commenting on a mother who was accused of drowning her newborn in a toilet, said: "It's an outrageous type of crime and totally unacceptable. We want to give the message to people contemplating this type of action that it will be thoroughly investigated and

Largely in response to Baby Ephraim's abandonment and subsequent death, the Indiana General Assembly, during its 2000 session, amended Indiana's child abandonment statute to provide a defense for a mother who leaves her less than thirty-day-old baby with an emergency medical services provider.⁶ The Indiana General Assembly addressed abandoned newborns again in 2001. The legislature amended Indiana Code section 31-34.2.5-1. The amendment allows an emergency medical services provider to take custody of an infant younger than *forty-five* days old without a court order if the parent voluntarily leaves the child and does not express an intent to return for the child.⁷ Interestingly, the criminal statute provides a defense to prosecution to the charge of abandonment for a child, *thirty* days old or less, who is left with an emergency medical services provider.⁸

Indiana Code section 31-34-2.5-1(c) states in relevant part: "Any person who in good faith voluntarily leaves a child with an emergency medical services provider is not obligated to disclose the parent's name or their name."⁹ Indiana Code section 31-34-2.5-2 addresses a common criticism of anonymous abandonment of children—that some newborns given to emergency medical services providers may actually have been abducted. It states in relevant part: "[N]ot later than forty-eight (48) hours after the local child protection service has taken custody of the child, [the protection service shall] contact the Indiana clearinghouse for information on missing children established by [Indiana Code section] 10-1-7-3 to determine if the child has been reported missing."¹⁰

Across the country, fifteen states, including Indiana, enacted legislation in 2000 to address the problem of abandoned children.¹¹ An additional ten states introduced abandoned infant legislation that did not pass during the 2000 legislative session.¹² Twenty-two states introduced abandoned infant laws in 2001.¹³

This Note proposes a change to Indiana's child abandonment statute,

aggressively prosecuted" Marie McCullough, *In Newborn Killings, A New Profile*, PHILA. INQUIRER, Nov. 23, 1997, at A21.

6. See IND. CODE § 35-46-1-4(c) (Supp. 2000).

7. *Id.* § 31-34-2.5-1.

8. *Id.* § 35-46-1-4.

9. *Id.*

10. *Id.* § 31-34-2.5-2.

11. NAT'L CONF. OF STATE LEGS., *Abandoned Infant Legislation 2000-2001*, at <http://www.ncsl.org/programs/cyf/ABSL2001.htm> (last updated Aug. 8, 2001) (Alabama, California, Colorado, Connecticut, Florida, Indiana, Louisiana, Michigan, Minnesota, New Jersey, New York, Ohio, South Carolina, Texas, and West Virginia).

12. *Id.* (Delaware, Georgia, Illinois, Kansas, Kentucky, Missouri, North Carolina, Oklahoma, Pennsylvania, and Wisconsin).

13. *Id.* (Alaska, Arizona, Arkansas, Georgia, Hawaii, Idaho, Illinois, Kentucky, Maryland, Massachusetts, Mississippi, Montana, New Mexico, North Dakota, Oklahoma, Oregon, Rhode Island, Tennessee, Utah, Virginia, Washington, and Wisconsin).

comparing Indiana's statute to those in other states. Some states,¹⁴ such as Indiana, provide a defense or an affirmative defense for mothers who leave their newborns with emergency medical personnel. Other states provide such mothers immunity from prosecution.¹⁵ This Note argues that Indiana should further amend its child abandonment statute to provide immunity from prosecution for mothers who abandon a child, forty-five days old or less, with an emergency medical services provider. With immunity from prosecution, mothers who feel abandonment is their only option upon giving birth, could ensure their child's safety and placement for adoption while maintaining anonymity.

Part I of this Note addresses the problem of abandonment in Indiana and across the United States. Part II provides background to abandonment and infanticide/neonaticide cases and identifies characteristics that are common to women who abandon their children or kill their newborns. Part III examines Indiana's 2000 amendment to the child abandonment statute.

Part IV addresses current Indiana law regarding the rights of mothers and putative fathers who are unidentified when adoption proceedings take place. Finally, Part V discusses the public policy concerns supporting a change to Indiana's child abandonment statute. Along with reforming the statute, the key to encouraging mothers to choose to leave their children in a safe environment is a continuing public relations campaign with the goal of educating mothers so that fewer abandonments will occur.

I. THE PROBLEM OF INFANT ABANDONMENT

Unfortunately, stories similar to Baby Ephraim's are far too common in Indiana and throughout the United States. This Part discusses the current statistics on infant abandonment in Indiana, including recent cases. It then details the dangerous circumstances in which mothers have abandoned infants in Indiana. Finally, in light of national statistics concerning infant abandonment, this Part analyzes the difficulties inherent in collecting accurate and meaningful statistics about infant abandonment and mothers who abandon.

A. *Infant Abandonment in Indiana*

Infant abandonment is a problem in Indiana. At least twenty-one babies have been abandoned in Indiana between 1990 and 2000, not including those babies who are left in the hospital after birth.¹⁶ For example, in November 2000, a woman in Anderson, Indiana, was arrested after leaving her five-month-old baby girl on a doorstep with a note that read "congratulations."¹⁷ In December 2000,

14. See *infra* note 129 and accompanying text.

15. See *infra* note 123 and accompanying text.

16. Penner, *supra* note 3.

17. Paul Baylor, *Police Arrest Mother After Baby Left on Porch*, HERALD BULL. ONLINE EDITION, Nov. 15, 2000 (on file with author). The article also indicated that the mother wanted one of the occupants of the house to have the baby because the occupant was dating the baby's father. *Id.*

a woman in South Bend, Indiana, abandoned a newborn baby in the entrance of an apartment building.¹⁸ In January 2001, police officers in Rome City, Indiana, found a dead baby in a gym bag while raiding a home for methamphetamine.¹⁹

More disturbing, perhaps, than the *number* of babies that have been abandoned in Indiana are the circumstances under which these infants have been abandoned.²⁰ For example, an article in *The Indianapolis Star* stated that of the four babies who were abandoned in the Indianapolis area in the last six years, only one survived.²¹ The abandonments in which the infants were found alive²² nonetheless involved obvious elements of risk.²³ The circumstances that newborns encounter when abandoned put them at high risk of serious harm or death. The Indiana General Assembly did respond to this serious problem by amending the child abandonment statute,²⁴ but this Note proposes that the Indiana General Assembly did not go far enough to protect newborns at risk of being abandoned. Many other states have also addressed this problem, and several have provided immunity from prosecution for a mother who leaves her newborn

18. Bryon Coppens, *Woman Claims Baby's Hers*, S. BEND TRIB., Dec. 24, 2000, at A1. The mother subsequently turned herself into the police. The mother was not arrested, but the case was forwarded to the Saint Joseph County prosecutor. *Id.* The baby was found to be in good health and was believed to be between three and seven days old when he was abandoned. The mother delivered the baby at home, and while the father was identified, he was not involved in the abandonment. The mother had not received prenatal care. *Id.*

19. *Infant's Body Found Inside Gym Bag*, INDIANAPOLIS STAR, Jan. 19, 2001 (on file with author).

20. Some assert that a majority of abandoned infants are not abandoned alive. "In American suburbia, teenagers have been known to leave their unwanted progeny in Dumpsters [sic] and public bathrooms. Most commonly, they suffocate their babies while stifling a cry." Evan Thomas, *Motherhood and Murder*, NEWSWEEK, July 2, 2001, at 20, 22.

21. Beaven, *supra* note 5.

22. See *supra* notes 17-18 and accompanying text.

23. For example, many abandoned babies are left near a dumpster. In addition to the danger of exposure to cold temperatures and inclement weather, an unsuspecting individual throwing away trash could crush the child. The child left on the doorstep in Anderson, Indiana, also faced a risk of exposure to cold or could have been attacked by an animal. The above are merely examples of the many kinds of harm that can happen to a newborn who is left alone and defenseless outside. Moreover, the calculation of risk of harm from external sources does not take into account other risk factors such as lack of nutrition, disease, or infection that can result from the circumstance of the birth.

24. The amendment states in relevant part:

It is a defense to prosecution based on an alleged act under this section that: (1) the accused person left a dependent child who was, at the time the alleged act occurred, not more than thirty (30) days of age with an emergency medical provider who took custody of the child under IC 31-34-2.5 when: (A) the prosecution is based solely on the alleged act of leaving the child with the emergency medical services provider; and (B) the alleged act did not result in bodily injury or serious bodily injury to the child . . .

IND. CODE § 35-46-1-4(c) (Supp. 2000).

with an emergency medical services provider.²⁵

B. National Statistics and Difficulties in Their Collection

One of the difficulties in trying to assess the problem of newborn abandonment is that often the mother who abandons her baby is the only one who knew about her pregnancy.²⁶ If the baby is never found, it cannot be included in any statistical enumeration.²⁷ Further, unlike adult disappearances, when a newborn is abandoned, the mother is often the only one who knows and the newborn is not likely to be reported as missing.

Despite the inherent secrecy surrounding abandonment, organizations and researchers are able to estimate the scope of the abandonment problem.

Nobody knows how many infants are thrown away in the nation's woods and wastebaskets every year. An unpublished survey of news reports conducted by the Department of Health and Human Services counted 65 "discarded infants" in 1991, eight of them dead. In 1998, the number was 105, with 33 dead.²⁸

The Child Welfare League of America placed the number of infants abandoned in 2000 at seventy.²⁹

Even if a newborn is found, another piece of the puzzle is still missing. Finding an abandoned newborn does not guarantee that the mother will be found. Without knowing the identity of the mother and the circumstances that drove her to abandon her child, it is difficult to assess the statistics in a truly meaningful way. Some researchers, though, have identified common characteristics of

25. See *infra* note 126 and accompanying text.

26. "[B]ecause so few are ever located, little is known about mothers who dump their newborns. They're usually, but not always, in their teens. They may, but may not, have drug problems They likely, but not necessarily, have hidden their pregnancy from others, and even themselves." Lynda Hurst, *Saving Babies From the Trash*, TORONTO STAR, Mar. 5, 2000, at NE6.

27. "[E]stimates . . . are based only on known cases, and it is likely that the actual number of neonaticides is higher." Christine A. Fazio & Jennifer L. Comito, Note, *Rethinking the Tough Sentencing of Teenage Neonaticide Offenders in the United States*, 67 FORDHAM L. REV. 3109, 3130 (1999) (footnote omitted).

28. *Safe Places for "Discarded Babies,"* USA TODAY, Feb. 8, 2000, at 15A. "[T]here is strong evidence that both homicides and fatal cases of child abuse are undercounted." Mary D. Overpeck et al., *Risk Factors for Infant Homicide in the United States*, 339 NEW ENG. J. MED. 1211, 1211 (1998) (footnotes omitted).

29. Kim Ode, *Where No Business is Good Business: Minnesota's Safe Place for Newborns Program Reports No Abandoned Babies Since April Debut*, STAR TRIB. (Minneapolis-St. Paul), Oct. 8, 2000, at 6E. This article notes that the number includes only babies abandoned in "dangerous places." Another difficulty lies in the lack of uniform reporting procedure for abandonment. "There is no credible research about how many infants are abandoned each year in the United States. Many abandonments are never reported." Stephen Beaven, *Texas Law to Curb Baby Abandonment Guides Indiana Plan*, INDIANAPOLIS STAR, Feb. 20, 2000, at A1.

mothers who abandon.

II. CHARACTERISTICS OF MOTHERS WHO ABANDON

In order for the Indiana General Assembly to accurately address the problem of infant abandonment, it is necessary to examine the various theories advanced for why women abandon or kill their infants, especially their newborns. Also, it is helpful to examine characteristics common to these women. With this information, the law can more adequately address the problem and tailor a suitable solution.

Because infant abandonment often results in the baby's death due to the many risk factors involved when a newborn is left without adequate protection from the elements, it is often categorized as infanticide or neonaticide. *Black's Law Dictionary* defines "infanticide" as "[t]he act of killing a newborn child, esp[ecially] by the parents or with their consent."³⁰ In some jurisdictions, "infanticide" is a term of art meaning the killing of a child less than one year old by the child's mother when "the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth or by reason of the effect of lactation consequent upon the birth of the child."³¹ Indiana has not adopted this definition, and, consequently, it is not referenced in this Note. *Black's Law Dictionary* does not define "neonaticide," but some journals and other scholarly literature define it as "the killing of a neonate on the day of its birth."³² Because many journals use "infanticide" and "neonaticide" interchangeably, the terms are used interchangeably in this Note. Infanticide is not a new phenomenon; in fact, evidence of infanticide can be found in ancient times.³³ Despite its long history, theories are still being advanced as to why infanticide occurs and how to prevent it from happening to another baby.

In his inaugural address on January 20, 2001, President George W. Bush said, "[W]hatever our views of its cause, we can agree that children at risk are not at fault. Abandonment and abuse are not acts of God, they are failures of love."³⁴ For legislators to properly address the problem of newborn abandonment and predict who might abandon in the future, it is important to discern characteristics of women who have abandoned their babies or killed their infants.

30. BLACK'S LAW DICTIONARY 781 (7th ed. 1999). For a comprehensive look at infanticide in America, see Michelle Oberman, *Mothers Who Kill: Coming to Terms With Modern American Infanticide*, 34 AM. CRIM. L. REV. 1 (1996).

31. Ania Wilczynski & Allison Morris, *Parents Who Kill Their Children*, 1993 CRIM. L. REV. 31, 34 (citing Infanticide Act of 1938, 1 and 2 Geo. 6, c. 36, § 1, sched. 6 (Eng.)).

32. Oberman, *supra* note 30, at 22 n.83 (citing Phillip Resnick, *Murder of the Newborn: A Psychiatric Review of Neonaticide*, 126 AM. J. PSYCHIATRY 1414, 1414 (1970)). Oberman defines "neonaticide" as the act of killing a child within twenty-four hours of birth. *Id.* at 22.

33. See, e.g., Thomas, *supra* note 20, at 22-23.

34. President George W. Bush, Inaugural Address (Jan. 20, 2001), available at <http://www.cnn.com/ALLPOLITICS/inauguration/2001/transcripts/template.html> (on file with the *Indiana Law Review*).

The statistics, though meager, nonetheless indicate a pattern of traits for female neonaticide offenders.

There are many reasons that statistics regarding characteristics of mothers³⁵ who abandon newborns shortly after birth are sparse.³⁶ First, as discussed earlier, it is difficult to determine the exact number of infants who are abandoned because it is believed that many abandoned infants are never found. Second, even if an abandoned infant is found, there is no guarantee that the mother will be found.³⁷

Despite the inherent difficulty in trying to categorize mothers who abandon their newborn infants,³⁸ some common traits have emerged. First, mothers who abandon their newborns are often unmarried teenagers.³⁹ Most disturbing about

35. "Homicides during the first week of life are most likely to be perpetrated by the mother." Overpeck et al., *supra* note 28, at 1211 (footnotes omitted). "[I]n the United States and throughout the world, the population under one year of age is at great risk of death from homicide. Their killers are more likely to be their own mothers than anyone else." Oberman, *supra* note 30, at 3 (footnotes omitted).

36. "A number of factors probably lead to an underascertainment of infant homicides. Five percent . . . of known homicides . . . occurred during the first day of life, but the actual number of infants killed on the day of birth could be higher, since some births may have been kept secret." Overpeck et al., *supra* note 28, at 1214; *see also* Oberman, *supra* note 30, at 21.

37. Baby Ephraim's mother has not been located even though he was found wearing a gold angel charm that was pinned to the sheet in which he was wrapped. Initially, investigators thought this distinctive piece of jewelry would help identify him. However, as of this writing, Baby Ephraim's mother has not been located. Beaven, *supra* note 5.

38. Another problem with trying to characterize women who abandon their infants or who are accused of neonaticide is that neonaticide cannot be limited to one particular race, educational level, or socio-economic class.

At first blush, the girls and women accused of neonaticide have little in common with one another. They come from every race, ethnicity, and socio-economic class. They live in big cities and small towns, in housing projects and suburban luxury homes. Some are new immigrants who have only recently learned English. Others are from families that have been in the United States for generations. Their ages range widely across the span of women's reproductive years. Many of the women are of seemingly limited intellectual ability, with low I.Q.s or poor school records. Yet almost as many are above average; many reports describe quiet, studious, college-bound honor students.

Oberman, *supra* note 30, at 23 (footnotes omitted).

39. Women neonaticide offenders are typically "young, poor, unmarried and socially isolated." Fazio & Comito, *supra* note 27, at 3132 (footnotes omitted). "[B]ecause so few [abandoned babies] are ever located, little is known about mothers who dump their newborns. They're usually, but not always, in their teens." Hurst, *supra* note 26. "State studies using linked birth and death certificates have consistently shown that the following maternal characteristics are risk factors for both unintentional and intentional infant deaths: a young age, a low level of education, late initiation of prenatal care, and previous births." Overpeck et al., *supra* note 28, at 1211. "The strongest predictive factors . . . were a maternal age of 19 years or younger, 12 years of education or less, single marital status, black or American Indian race, a first prenatal visit after

this fact⁴⁰ is that teenage girls are developing physically sooner than they have in the past, which can lead to increased pressure to become sexually active.⁴¹ While it is true that not all teenage sexual activity results in pregnancy, not all pregnancy results in birth,⁴² and not all birth results in abandonment, it is important to note that women who are sexually active and who may subsequently abandon their babies may be younger than in the past.

Sexual activity among teenagers is nothing new.⁴³ A 1995 study found that 48.1% of all never-married⁴⁴ women between fifteen to nineteen years old have had sexual intercourse.⁴⁵ Teenage women between the ages of fifteen and nineteen who have had sexual intercourse generally had *some* relationship with their first sexual partner, but in the majority of cases the relationship was not a marriage or engagement.⁴⁶ Further, it is common for girls who are just beginning

the sixth month of pregnancy or no prenatal care, and a gestation of less than 28 weeks” *Id.* at 1212. “Most of the women accused of neonaticide are young and single.” Oberman, *supra* note 30, at 23.

40. “Just as many girls seek sexual relations in order to obtain the emotional and social validation they need, they frequently are harmed by another uniquely adolescent phenomenon: the difficulty in appreciating the long-range consequences of their actions.” Oberman, *supra* note 30, at 58 (footnote omitted).

41. For a complete discussion of early physical development in girls, see Michael D. Lemonick, *Teens Before Their Time*, TIME, Oct. 30, 2000, at 66. Lemonick states that although the average age of first menstruation has remained steady since the 1960s at 12.8 years, there has been a drop in average age for the outward physical changes of puberty. *Id.* at 68.

42. “Fifty-five percent [of teenagers who become pregnant] gave birth, 29 percent had abortions and the rest miscarried.” *Teen-pregnancy Rate Hit Record Low in ‘97*, INDIANAPOLIS STAR, June 13, 2001, at A10.

43. *See id.* Although sexual activity among teenagers does seem to be common, the percentage of teenagers who have engaged in sexual intercourse declined slightly in the 1990s, and the teenage pregnancy rate was at a record low in 1997. *Id.* The declining number of teens who are engaging in sexual intercourse may be related to the growing popularity of abstinence pledges among teens.

44. Only the statistics of never-married teenage women are being considered in this Note because the majority of mothers who abandon are unmarried teenagers. *See* Oberman, *supra* note 30, at 23; Overpeck et al., *supra* note 28, at 1212-14. Additionally, there is an “expectation that marriage incorporates sexual intimacy” STATISTICAL HANDBOOK ON THE AMERICAN FAMILY 138 (Bruce A. Chadwick & Tim B. Heaton eds., 2d ed. 1999) [hereinafter HANDBOOK].

45. A further examination of the fifteen to nineteen year old age group finds that 36.8% of teenage women between fifteen and seventeen years old have had sexual intercourse and 67.4% of teenage women between eighteen and nineteen years old have had sexual intercourse. HANDBOOK, *supra* note 44, at 141. If the statistics are broken down by year of age, there is a startling increase in the percentage of teenage women who have had sexual intercourse. At age fifteen, 21.4% of teenage women have had sexual intercourse; at age sixteen, the percentage rises to thirty-eight percent; at age seventeen, the percentage rises to 49.6%; at age eighteen, the percentage rises to 62.7%; and, at age nineteen, the percentage rises to 72.4%. *Id.*

46. The percentages of the types of relationships that teenage women between the ages of

to become sexually active not to use contraception.⁴⁷

Another common characteristic of neonaticide offenders is low self-esteem.⁴⁸ Beyond youth and low self-esteem, one of the main characteristics of mothers who abandon is that the mothers kept the pregnancy a secret⁴⁹ from others. "Very few of the [women accused of neonaticide] told their families or friends that they were pregnant."⁵⁰ The reasons for keeping a pregnancy a secret are numerous, but usually the woman is in denial,⁵¹ is ashamed,⁵² or fears punishment.⁵³

fifteen to nineteen had with their partners when they first had voluntary intercourse are defined as follows: 2.8% "just met"; 10.5% were "just friends"; 9.7% "went out once in a while"; 72.7% were "going steady"; 2.8% were "engaged"; 1.5% were married; and 0.1% were with a family member, with someone with whom the woman was living, or another situation. *Id.* at 148. These statistics show that over ninety-five percent of the teenage women were not engaged or married to their first sexual partners.

47. Oberman, *supra* note 30, at 57. Of unmarried women between the ages of fifteen to twenty-nine years old who had sexual intercourse within the last twelve months, only 32.2% of the women indicated that their male partner had used a condom for disease prevention "every time" they had sexual intercourse. HANDBOOK, *supra* note 44, at 154. An astounding 29.3% of the women indicated that their male partner never used a condom for disease prevention. *Id.* Although these statistics are not a good predictor of pregnancy risk because of the plethora of other methods to prevent pregnancy, they are important in assessing risky behavior. Further, the statistics appear to include women who did not take alternate means of contraception to prevent the possibility of pregnancy.

48. Oberman, *supra* note 30, at 71. "[T]he girls involved in neonaticide cases possess so little self-esteem that they are incapable of acting to protect themselves. Their insecurity almost certainly contributes to their becoming pregnant in the first place, and it leads to their paralysis once pregnant." *Id.* "Neonaticide offenders tend to be young, passive women who have low self-esteem [and] feel unloved and alone. . . ." Fazio & Comito, *supra* note 27, at 3149.

49. Dr. Roberta Hibbard, director of the child protection program for Indiana University Medical Center, identified two common factors among mothers who abandon: the mother is often "very young," and the mother often has "kept the pregnancy a secret." O'Neal & McCleery, *supra* note 1.

Some studies have found that mothers are the perpetrators in the majority of cases only in the case of homicides during the first week of life. A possible explanation is that the mother is trying to hide the pregnancy and birth 95 percent of infants killed during the first day of life were not born in a hospital, as compared with 8 percent of all infants killed during the first year of life—a finding that is consistent with this explanation. Overpeck et al., *supra* note 28, at 1214.

50. Oberman, *supra* note 30, at 24.

51. "[N]eonaticide usually results from an unwed girl's fear of revealing her pregnancy . . . because of shame or punishment." Fazio & Comito, *supra* note 27, at 3133 (footnote omitted).

52. "Even if society has halted legal discrimination against children born out of wedlock, there is still considerable shame and guilt associated with a teenager's pregnancy" *Id.* at 71.

53. "Certainly, we know that teens commonly fear the repercussions that might follow should their parents find out that they are sexually active Many girls shared the belief that, if and

The degree of shame in the loss of virginity before marriage⁵⁴ is unclear. Statistics show that seven percent of adult males and twenty-one percent of adult females who have had sexual intercourse list the reason for having first voluntary sexual intercourse as “wedding night.”⁵⁵ In 1996, 33.5% of Americans said that premarital sex was “always or almost always wrong.”⁵⁶ Of the youngest people surveyed, those between eighteen and twenty-four years old, 22.5% said that premarital sex was “always or almost always wrong.”⁵⁷ According to these statistics, it would appear that sexual intercourse before marriage is common and not regarded by most Americans as wrong.

On the other hand, a sexual double standard has been persistent in modern America. The primary example of the sexual double standard is the perpetuation of terms such as “whore” and “slut” which refer to females who engage in sexual intercourse without an equivalent term for males.⁵⁸ Males, on the other hand, are often praised for their sexual prowess and experience.⁵⁹

Despite the seeming lack of shame in the loss of virginity before marriage, there does seem to be a continuing shame attributed to unwed motherhood, especially to unwed *teenage* motherhood. Public statements condemning unwed motherhood and teenage motherhood have come from both a Republican Vice President and a Democratic President. One of the best examples of public disapproval of unwed motherhood in the early 1990s came with Vice President Dan Quayle’s verbal condemnation of the television character Murphy Brown’s single motherhood.⁶⁰ Similarly, President William Jefferson Clinton addressed teenage pregnancy and non-marital children in his 1995 State of the Union Address when he stated: “We’ve got to stop the epidemic of teen pregnancies and births where there is no marriage . . .”⁶¹ President Clinton then noted that approximately one million teenagers in the United States would become pregnant

when they disclosed their pregnancy, they would be kicked out of their homes.” *Id.* at 59 n.284.

54. The statistics on the loss of virginity only take into account consensual sexual intercourse. Shame is compounded when a girl becomes pregnant due to rape or sexual abuse. Fazio & Comito, *supra* note 27, at 3109 n.4 (citing Geoffrey Knox, *A Revolution Brewing in Women’s Health*, OPEN SOC’Y NEWS, Spring 1999, at 4). In 1999 in Indiana, a Nigerian woman alleged that she became pregnant because she was raped in her home country. Ruth Holladay, *Mother Made a Mistake, but She’s Already Been Punished*, INDIANAPOLIS STAR, Feb. 20, 2000, at B1. For more about this woman, see *infra* note 107.

55. HANDBOOK, *supra* note 44, at 147.

56. *Id.* at 157.

57. *Id.*

58. Michelle Oberman, *Turning Girls Into Women: Re-Evaluating Modern Statutory Rape Law*, 85 J. CRIM. L. & CRIMINOLOGY 15, 15-19 (1994).

59. *Id.*

60. See, e.g., Dan Quayle, Editorial, *Addressing Breakdown of Family Must Be Priority for Both Parties*, EVANSVILLE COURIER, Dec. 17, 1993, at 19A.

61. *What Clinton Says He’ll Do: State of the Union—1995*, S.F. EXAMINER, Jan. 25, 1995, at A16.

in 1995.⁶² “Epidemic” is a powerful word which connotes a severe problem. Statements such as these demonstrate that a public stigma attached to unwed teenage motherhood and unwed motherhood in general may still exist.

Although somewhat difficult to believe, some teenage women may become pregnant and not even realize it, either because of severe denial or because they are immature⁶³ and unable to fully comprehend all of the telling physical symptoms of pregnancy.

Denial of pregnancy is more common among teenagers because they often prolong the interval between suspecting and confirming that they are pregnant. Indeed, with the increased use of birth control, which can result in regular menstrual bleeding even during pregnancy, some teens, understandably, do not recognize that they are pregnant.⁶⁴

There are two main problems with denial.⁶⁵ First, denial can prevent the mother from bonding with the baby while pregnant.⁶⁶ Second, if the woman is in denial when she begins to deliver the baby, she may be scared and not realize what is happening⁶⁷ or be unaware⁶⁸ of what to do with the resulting child.⁶⁹

62. *Id.*

63. A common psychological characteristic of teenage neonaticide offenders is the “lack of ability to act to address their problem.” Fazio & Comito, *supra* note 27, at 3133 (footnote omitted).

64. *Id.* at 3134 (footnotes omitted).

65. “Denial has been described as a mechanism that reduces unpleasant feelings and beliefs by means of disavowing aspects of reality and typically exists when there is some stressful threat to the individual.” *Id.* at 3133 (footnote omitted).

66. *Id.* at 3134.

67. “[A] fourteen year old girl . . . claims to have been unaware that she was pregnant Throughout the day that she delivered the baby, she experienced what she thought were severe menstrual cramps.” Michelle Oberman, *The Control of Pregnancy and the Criminalization of Femaleness*, 7 BERKELEY WOMEN’S L.J. 1, 2 (1992).

68. Teenage women especially may be unaware of how to care for a newborn baby because of lack of knowledge resulting from a lack of life experience. For example, one fourteen-year-old girl explained that she put her newborn baby in a toilet after giving birth because “she thought the baby ‘would be safe in the water because it had been in liquid inside of her.’” *Id.* at 3.

69. After the shock and trauma of the birth, the mother is confronted with the harsh reality of the baby.

After delivering the baby, the women’s actions range from exhaustion to utter panic. Many of the women temporarily lost consciousness, leaving the baby to drown in the toilet. Others left the baby in the water while they frantically cleaned the messy remains of the delivery from the floors and walls of the bathroom. Still others immediately pulled the baby from the toilet and actively contended with their situations. In several cases, women threw their babies out of bathroom windows. More commonly, the women suffocated or strangled their babies to prevent them from crying out. A few of the women silenced the baby with blows to its head or stab wounds inflicted with scissors.

Oberman, *supra* note 30, at 25 (footnotes omitted).

In most cases of neonaticide, . . . it is questionable whether the teen makes a conscious choice. She might deny her pregnancy due to fear and panic of her parents' and teachers' reactions, intense shame, or her desire to ignore the situation and get on with her life. . . . The problem does not go away, of course, and the teen is forced to face what she has denied for nine months when she gives birth. Shocked and frightened, the teen either violently kills the baby . . . or abandons the baby where it dies of exposure. In fear and shame, she covers up what she did, usually by disposing the baby in the trash or outdoors.⁷⁰

Many teenage women who are in denial that they are pregnant are shocked when they go into labor.⁷¹ As a result, they often give birth at home because they do not realize what is happening.

[N]eonaticide cases . . . present[] the same basic facts: the women experience[] severe cramping and stomach pains, which they often attribute[] to a need to defecate. They spen[d] hours alone, most often on the toilet, often while others [are] present in their homes. At some point during these hours, they realize[] that they [are] in labor. They endure[] the full course of labor and delivery without making any noise.⁷²

According to a comprehensive study in the *New England Journal of Medicine*,⁷³ there is evidence that a home birth can lead to an increase in infanticide.⁷⁴ "Ninety-five percent of infants killed on the first day of life were not born in a hospital From 1989 through 1991, 71 percent of all homicides on the first day of life involved infants born at a place of residence."⁷⁵ Another study showed that "an extraordinarily high number of infants are killed within twenty-four hours of birth."⁷⁶ Further, a third study indicated that in 1999, forty-two percent of parental infanticides involved children who were less than one year old.⁷⁷

70. Fazio & Comito, *supra* note 27, at 3109-10 (footnotes omitted).

71. "In [a] study of adoption at birth in France, four out of twenty-two subjects had denied their pregnancy such that they were taken by surprise at childbirth." *Id.* at 3133-34 (footnote omitted).

72. Oberman, *supra* note 30, at 24-25.

73. Overpeck et al., *supra* note 28. The study did not include "[fifty-two] deaths caused by neglect, abandonment, or exposure but classified as unintentional. . . ." *Id.* at 1212. To that extent, this study may not be helpful in understanding mothers who abandon because many of their children, as discussed earlier, die from exposure. The study is helpful by analogy because it looks at deaths classified as intentional. Certainly some situations, such as another putting a newborn in a duffel bag after its birth, could be classified as intentional.

74. *Id.*

75. *Id.*

76. Oberman, *supra* note 30, at 22.

77. Thomas, *supra* note 20, at 24.

To effectively address the problem of abandonment, the solution must focus on the causes of abandonment.⁷⁸ Shaping a solution for abandonment and the way abandonment is treated in the criminal law⁷⁹ requires the analysis of two factors: the characteristics of mothers who abandon, and the best means of preventing abandonment. Currently, abandonment is a felony in Indiana.⁸⁰ However, criminal punishment does not address the underlying problems of the teenage mothers who abandon.

III. THE INDIANA CODE'S REGULATION OF NEWBORN ABANDONMENT

This Part examines and exposes the deficiencies of current Indiana law regarding newborn abandonment in light of the common characteristics of mothers who abandon or kill their newborns or infants. A close reading of the relevant statute reveals that "defense to prosecution"—a key term of the 2000 amendment—is not defined in the statute or Indiana case law. Finally, this section establishes that, under Indiana law, an infant does not actually have to be injured for the mother to be charged and explains the ramifications for mothers who deliver their babies at home before abandoning them with an emergency medical services provider.

Under Indiana law, abandonment of a dependent is a form of dependent neglect and charged as a felony.⁸¹ Neglect of a dependent may involve physical

78. "Although the babies died at their mothers' hands, many others should be implicated in their deaths—the fathers, grandparents, friends, schools and workplaces, and society as a whole." Oberman, *supra* note 30, at 4.

79. Some feminist scholars believe that women are treated especially harsh or are seen as mentally ill for their personal decisions regarding reproduction.

[R]easons for women's crimes are sought within the discourse of the "irrational" and the "pathological": for example, mental illness, menstruation, poor socialisation. . . .

Although socio-economic problems are considered to some extent, this is usually only in the context of demonstrating that the offence was a symptom of the woman's inability to cope with such stresses, rather than it was a *rational* response to them.

Ania Wilczynski, *Images of Women Who Kill Their Infants: The Mad and the Bad*, 2 WOMEN & CRIM. JUST. 71, 72 (1991) (emphasis in the original).

[W]e see a government that sits in judgment on the reproductive decisions made by certain women The criminal justice system's responses reflect a belief that some of these women should not be having sexual intercourse, others should not be bearing children The penalties . . . punish women for . . . conceiving and reproducing.

Oberman, *supra* note 67, at 2.

80. IND. CODE § 35-46-1-4 (Supp. 2000).

81. Someone "who knowingly or intentionally . . . (2) abandons . . . the dependent [or] (3) deprives the dependent of necessary support . . . commits neglect of a dependent, a Class D felony." *Id.* § 35-46-1-4(a). "[T]he offense is: (1) a Class C felony if it is committed under subsection . . . (a)(2), or (a)(3) and results in bodily injury; (2) a Class B felony if it is committed under subsection . . . (a)(2), or (a)(3) and results in serious bodily injury. . . ." *Id.* § 35-46-1-4(b).

abandonment⁸² or depriving the dependent of necessary support.⁸³ Often, in the case of newborn abandonment, both are included in the offense. “‘Support’ means food, clothing, shelter, or medical care.”⁸⁴ Indiana’s 2000 child abandonment statute provides a defense to the charge of abandonment for a mother who leaves her newborn with an emergency medical services provider when “the prosecution is based solely on the alleged act of leaving the child with the emergency medical services provider.”⁸⁵

An initial problem with the 2000 abandonment statute is that it did not define “defense to prosecution” or “defense.” Neither “defense to prosecution” nor “defense” were included in the definitions for Article 46.⁸⁶ The Indiana Supreme Court and the Indiana Court of Appeals have examined other defenses, such as insanity,⁸⁷ mistake of fact,⁸⁸ and selective prosecution⁸⁹ to explain the defendant’s burden of proof and, more importantly, the elements of the defense. In some instances, such as in the mistake of fact defense,⁹⁰ elements of the defense are indicated in the statute granting the defense,⁹¹ highlighting that at times the legislature does choose to elaborate on elements of particular defenses. In the absence of such statutory elaboration, the Indiana Court of Appeals and the Indiana Supreme Court establish or interpret the elements and the burden of proof for various defenses.⁹²

Arguably, if the legislature were serious about providing such a defense, it would have spelled out the elements and burden of proof for the defense in the text of the statute. However, because the elements and burden of proof for “defense to prosecution” are not set out in the abandonment statute, individuals must wait for the Indiana courts to interpret or explain this defense. Of course, the Indiana courts will have the opportunity to interpret the defense only if a mother raises the issue in her prosecution. In so doing, the mother must file a motion to dismiss⁹³ and state the defense as a “ground for dismissal.”⁹⁴ However, if the dismissal is not granted, the defendant will go to trial and be at the mercy of

82. *Id.* § 35-46-1-4(a)(2).

83. *Id.* § 35-46-1-4(a)(3).

84. *Id.* § 35-46-1-1.

85. *Id.* § 35-46-1-4(c)(a).

86. *See id.* § 35-46-1-1.

87. *See Van Orden v. State*, 469 N.E.2d 1153, 1159 (Ind. 1984) (explaining that defendant has burden of proof for an insanity defense).

88. *See Lechner v. State*, 715 N.E.2d 1285, 1286-87 (Ind. Ct. App. 1999) (explaining elements and defendant’s burden of proof for defense of mistake of fact and citing applicable statutes and case law to define mistake of fact defense).

89. *See Dix v. State*, 639 N.E.2d 363, 366 (Ind. Ct. App. 1994) (stating three elements of defense of selective prosecution).

90. *See Lechner*, 715 N.E.2d at 1286-87.

91. *See* IND. CODE §§ 35-41-3-7, 35-42-4-3(c) (Supp. 2000).

92. *See supra* notes 87-88 and accompanying text.

93. *See* IND. R. CRIM. P. 3.

94. *Id.*

of the trier of fact in what would likely be a high-profile trial.

An additional problem with the statutory language, “defense to prosecution,” is that it connotes that prosecutors are without discretion to prosecute women who leave their newborns with an emergency medical services provider. However, the executive director of the Indiana Prosecuting Attorney’s Council stated that he did not think prosecutors would bring charges against a mother who left her baby with an emergency medical services provider.⁹⁵ Therefore, the effect of the statute is unclear. If mothers will not be prosecuted, there is no need to provide for a defense.

The statute is also unclear as to what kinds of abandonment are covered by the defense. The wording of the statute implies that the defense applies only to *physical* abandonment and not to abandonment for lack of support.⁹⁶ It is easy to imagine teenage mothers who give birth at home not providing their infants with medical attention or food before taking them to emergency medical services providers. In fact, lack of medical attention or food for the infant may be the reason that a teenage mother chooses to abandon her child with an emergency medical services provider in the first place. Under the statute, it is unclear whether a mother would have a defense for the lack of support provided to the infant during and after the home birth.⁹⁷ An infant born at home would likely be

95. Penner, *supra* note 3. There is some evidence that prosecutors have chosen not to prosecute mothers who leave their newborns with an emergency medical services provider.

Steve Johnson, executive director of the Indiana Prosecuting Attorney’s Council . . . briefed county prosecutors from across the state, and predicted that mothers who make a clear effort to keep their babies safe won’t be prosecuted.

Technically, the new law creates a legal defense for parents who give up their babies, as long as the babies show no signs of abuse or neglect, to police, firefighters, paramedics and hospital emergency room medical staff.

“If a mother truly does follow the provisions of the law, I think it’s very unlikely a prosecutor will file charges,” Johnson said. “If the baby’s safe—I think that’s all they care about.”

Id. This informal amnesty program is very similar to a program in Mobile, Alabama.

“Prevention is a far better alternative than prosecution,” said John Tyson, Jr., Mobile County district attorney, who helped create what he says is the first program of its kind in the United States. The Alabama District Attorneys Association joined Tyson last fall, agreeing not to press abandonment charges where such a program exists.

Edith Stanley, *Program Addresses Infant Abandonment*, NEWS & OBSERVER (Raleigh, N.C.), Jan. 29, 2000, at A11.

If it is true that prosecutors are not going to prosecute women who abandon their unharmed child with an emergency medical services provider, then the Indiana General Assembly, the ultimate authority of the public policy of the state, should codify this into law, rather than leave it to informal amnesty programs or policies of county prosecutor’s offices.

96. See *supra* note 24.

97. In 1992, the Indiana Court of Appeals held that “necessary support” for the purposes of the offense of neglect of a dependent was based upon a knowing or intentional deprivation of necessary support. *Ricketts v. State*, 598 N.E.2d 597, 600 (Ind. Ct. App. 1992). “Necessary

in need of medical attention just based on the circumstances of the birth.⁹⁸

Further, according to the statistics previously cited, a teenage mother who abandons her baby is less likely to have received prenatal care than a mother in other circumstances, thus increasing the odds that her newborn could have medical problems. The statistics also show that mothers who abandon their infants tend to have less than twelve years of education.⁹⁹ Beyond the consideration of formal education, a teenager also lacks the life experience of an adult. This lack of education and experience could increase the possibility that the mother would not be able to identify medical problems of the newborn and provide assistance to the baby. For example in 2001, an Indianapolis teenager was convicted of criminal recklessness in the death of her newborn.¹⁰⁰ According to the mother, the child was blue at birth. After the mother's attempts at resuscitation failed, she wrapped the infant in towels and placed it in a duffel bag.¹⁰¹ According to the prosecution, the baby smothered to death over a period of five hours while lying in the bag.¹⁰²

Compounding the difficulty of addressing a newborn's medical problems is the probability that the mother was in denial. Moreover, the shock of the birth itself could leave the mother in an irrational mental state. "A fourteen year old's failure to recognize the onset of labor and to know how to deliver her own baby is not a sign of a mental deficiency or criminality."¹⁰³ The circumstances surrounding the pregnancy and the birth itself could mean that the mother may not be able to provide the necessary medical care for the new baby.¹⁰⁴ To meet the knowledge requirement of the statute, the state must show that the mother "was 'subjectively aware of a high probability that [s]he placed the child in a

support" includes "essential, indispensable or absolutely required food, clothing, shelter[,] and medical care; i.e., food, clothing, shelter, and medical care without which the dependent's life or health is at risk or endangered." *Id.*

98. See Oberman, *supra* note 30, at 82.

Even if [the mother's] behavior prior to the birth is both legal and unintentional, it can be argued that, once the baby is born, the woman's failure to seek assistance is either criminally negligent or reckless because a parent has a legal duty to furnish medical care for her child.

Id.

99. "[A] teenager does not have the same knowledge of sex, pregnancy, and birth as an adult, so the teenager should be judged under a different standard of proving mens rea than an adult." Fazio & Comito, *supra* note 27, at 3151 (footnote omitted).

100. Vic Ryckaert, *Mother Faces 3 Years for Newborn's Death*, INDIANAPOLIS STAR, July 27, 2001, at B5.

101. *Id.*

102. Vic Ryckaert, *Teen Mother Awaits Verdict in Neglect Case*, INDIANAPOLIS STAR, July 26, 2001, at B4.

103. Oberman, *supra* note 67, at 5.

104. *Id.* "[I]t is hard to discern what a reasonable standard of care should be for delivering babies when one is fourteen, lacking education about human reproduction, and totally unaware that she is pregnant." *Id.* at 3.

dangerous situation.”¹⁰⁵

A teenage mother who abandons her baby with an emergency medical services provider does not necessarily abandon a child seriously in need of medical attention. However, based on the statistics compiled about the babies who are abandoned and the mothers who abandon them, it seems probable that a case could be made that the abandoned baby lacked support in the form of medical attention. Under the statute as it is currently written, the mother would not have a defense for lack of support. Because of this discrepancy, it is unclear whether the defense added in the 2000 amendment would be a defense at all for a teenage mother who abandons her infant in a hospital after a home birth. In this sense, the statute does not address the problem.

The *effect* of the statute may be to punish mothers who leave their babies in need of medical attention and to not punish those who abandon babies not in need of medical attention. However, the statute does not provide guidelines for determining what constitutes a lack of medical attention. “[T]here must be something in a criminal statute to indicate where the line is to be drawn between trivial and substantial things so that erratic . . . convictions for trivial acts and omissions will not occur. It cannot be left to juries, judges, and prosecutors to draw such lines.”¹⁰⁶ Because newborns abandoned by teenage mothers present a high statistical probability for having medical problems constituting lack of support under the Indiana Code, it would appear that the majority of teenage mothers granted a defense for abandonment by leaving their child with an emergency medical services provider would gain no defense at all.

Furthermore, the defendant can be convicted of neglect of a dependent even if the dependent is not actually injured.¹⁰⁷

[T]he defendant does not have to actually injure the dependent to be convicted, just “place[] the dependent in a situation that may endanger his life or health.” This has been interpreted to mean “expose the dependent to a danger which is actual and appreciable.” While most cases do involve injuries to the dependent, defendants have been convicted when no actual injuries to the dependent occurred.¹⁰⁸

105. *Sanders v. State*, 734 N.E.2d 646, 650 (Ind. Ct. App. 2000) (quoting *Smith v. State*, 718 N.E.2d 794, 806 (Ind. Ct. App. 1999)).

106. *State v. Downey*, 476 N.E.2d 121, 123 (Ind. 1985).

107. For example, in 2000, a young woman who came to the United States from Nigeria was convicted of neglect after leaving her baby in a trash bin shortly after the child’s birth. Vic Ryckaert, *Teen Guilty of Felony Child Neglect*, INDIANAPOLIS STAR, July 29, 2000, at B1. The baby survived and the woman was charged with attempted murder, but the judge in the case ruled that the prosecution had not proved beyond a reasonable doubt that the defendant intended to kill the baby. *Id.*

108. Kenneth D. Dwyer, Note, *Indiana’s Neglect of a Dependent Statute: Uses and Abuses*, 28 IND. L. REV. 447, 454 (1995) (alteration in original) (footnotes omitted). For cases where a defendant was convicted despite the fact that the dependent was not actually injured, see:

Sample v. State, 601 N.E.2d 457 (Ind. Ct. App. 1992) (mother convicted for failure to

In 2000, the Indiana Supreme Court articulated the standard of care for a parent whose dependent is in need of medical attention. The court stated: "When there are symptoms from which the average layperson would have detected a serious problem necessitating medical attention, it is reasonable for the jury to infer that the defendant knowingly neglected the dependent."¹⁰⁹

Prosecutors are elected officials that come and go depending on the election results. Just because a prosecutor in a given county decides not to prosecute in a given year does not mean that a newly elected prosecutor in a subsequent year could not decide to prosecute mothers for abandoning their newborns in an emergency room. Finally, a prosecutor's statement to the media that he will not prosecute for a given offense is not binding.

Sound public policy demands certainty in the law. Considering the multiple interpretations of the statute discussed here, it is not difficult to imagine that teenage mothers who are considering abandoning a newborn would be confused, even if she knew the statute was on the books. Confusion, in addition to stress and emotional anguish, could cause the mother to abandon her baby in a dumpster rather than choosing safety and the best interests of the child.

IV. CURRENT LAW IN INDIANA REGARDING THE RIGHTS OF MOTHERS AND PUTATIVE FATHERS WHO ARE UNIDENTIFIED WHEN ADOPTION PROCEEDINGS TAKE PLACE

One of the biggest concerns with granting immunity and anonymity to mothers who abandon their newborns with emergency medical services providers is whether the mother and father of the infant have given the requisite consent to the subsequent adoption of the child. Indiana has established law for dealing with mothers and fathers whose identity is unknown when the child is placed for adoption. Obviously, the problem of an unknown parent is more acute when dealing with fathers because *generally* the mother is known in an adoption proceeding. However, in the case of an adoption proceeding involving an abandoned baby, the mother may not be known.

In Indiana, a mother's consent to the adoption of her child is not necessary if she abandons the child.¹¹⁰ The requisite consent for adoption is inferred from

obtain prompt medical care for her four-month-old infant after the child fell and fractured her skull even though the child's physician testified that the delay itself did not constitute an actual and appreciable threat to the child's life or health); *Johnson v. State*, 555 N.E.2d 1362 (Ind. Ct. App. 1990) (mother convicted when she delayed obtaining medical care for her burned seventeen-month-old infant because there was a risk of severe infection even though the delay did not actually cause any harm).

Id. at 454 n.77.

109. *Mitchell v. State*, 726 N.E.2d 1228, 1240 (Ind. 2000) (footnote omitted) (citing *Hill v. State*, 535 N.E.2d 153, 155 (Ind. Ct. App. 1989)).

110. *In re Adoption of Thomas*, 431 N.E.2d 506, 512 (Ind. Ct. App. 1982).

The parent's careless . . . failure to perform his parental duties is a significant element of the offense of abandonment Such neglect is to be considered regardless of any

the abandonment of the infant. If the mother does not disclose her name or the name of the child pursuant to Indiana Code section 31-34-2.5-1, the mother “is not required to be notified” of hearings regarding the child.¹¹¹ If a mother changes her mind after abandoning the baby at the hospital, it is likely the mother will not regain legal custody of her child.¹¹² Because the mother is the one abandoning the child and because historically it has not been as difficult to identify the mother, the legislature has adequately provided for the rights of the mother in an adoption proceeding after the mother has abandoned the infant.

The rights of the father are more complicated because often the father cannot easily be identified. First, the father may not know the child exists because the mother may not have informed him about the pregnancy or the birth of the child. Second, the mother may not know who the father is for any number of reasons.¹¹³ Third, the mother may lie and say that she does not know the father, or may lie to the actual father and say the child is not his. All of these problematic identification factors contribute to paternal rights being more complicated than maternal rights. Perhaps the biggest concern about anonymous abandonment of newborns is that the father’s rights will be terminated without his notice or consent.

The Indiana General Assembly’s delineation of putative father rights are applicable in the case of the adoption of an infant abandoned anonymously by the mother. The Indiana Code defines “putative father” as

a male of any age who is alleged to be or claims that he may be a child’s father but who: (1) is not presumed to be the child’s father . . . and (2) has not established paternity of the child: (A) in a court proceeding; or (B) by executing a paternity affidavit . . . before the filing of an adoption petition.¹¹⁴

actual intention or settled purpose by the parent to relinquish his proprietary claim to his child Abandonment imports any conduct on the part of the parent which evinces an intent or settled purpose to forego all parental duties and relinquish all parental claims to the child. In abandonment cases, it is only necessary that the intention or settled purpose of the parent exist as to non-performance of his required parental duties and obligations.

Id.

111. IND. CODE § 31-34-21-4(f) (Supp. 2001).

112. *Id.* § 31-34-21-5.6 (Supp. 2001).

Reasonable efforts to reunify a child with the child’s parent . . . are not required if the court finds . . . (5) The child is an abandoned infant, provided that the court: (A) has appointed a guardian ad litem or court appointed special advocate for the child; and (B) after receiving a written report . . . and after a hearing, finds that reasonable efforts to locate the child’s parents . . . would not be in the best interests of the child.

Id.

113. Those reasons may include rape, sex with multiple partners, and sex with partners whose identity is unknown to the mother.

114. IND. CODE § 31-9-2-100 (1998).

Indiana imposes a duty on the father to register with the Putative Father Registry in order to receive notice that the child is being placed for adoption.¹¹⁵ In the case of a father who is unaware that he has fathered a child, the burden to register becomes an even more important issue.

It is unfortunate but true that a man may be unaware that he has fathered a child. It is equally true, and equally unfortunate, that the mother and her family can prevent the man from learning of the pregnancy. Yet a man must accept some responsibility in the matter. Due process does not require that every possible biological father be given notice of adoption proceedings—only that the notice scheme not omit many responsible fathers The fact that a man does not know or fails to learn that he has fathered a child reduces the likelihood that he will step forward to establish a responsible parent-child relationship.¹¹⁶

The primary reason for the strict requirements of registry is the well being of the child.

[A] child should not be made to suffer when a putative father is ignorant of his parenthood due to his fleeting relationship with the mother and her unwillingness to notify him about the pregnancy. The child should also not be made to suffer when a putative father makes no inquiry regarding the possibility of a pregnancy.¹¹⁷

The legislature already has procedures in place that allow for the quick adoption of children. More important, the legislature has provided means for determining the best interests of the child. A mother who abandons her child with an emergency medical services provider relinquishes her parental rights. If a father has not registered with the Putative Father Registry according to the rules set forth in the Indiana Code and the mother has not voluntarily provided the father's name, the father will not be given notice of the adoption proceedings. In this sense, the father is not losing his parental rights simply because the mother abandons the baby with an emergency medical services provider. The Indiana General Assembly has already provided for the case of an unknown father. The fact that a mother abandons a child with an emergency medical services provider does not require different treatment in relation to the putative father's rights.

115. "A putative father who fails to register . . . waives notice of an adoption proceeding. The putative father's waiver under this section constitutes an irrevocably implied consent to the child's adoption." *Id.* § 31-19-5-18. The father has a limited period of time within which to register with the Putative Father Registry. "If a putative father fails to register with the Registry within 30 days of the child's birth or the date of the filing of the petition for the child's adoption, whichever occurs later, the State's obligation to provide this child with a permanent, capable and loving family becomes paramount." *Jones v. Maple*, 734 N.E.2d 281, 287 (Ind. Ct. App. 2000).

116. *B.G. v. H.S.*, 509 N.E.2d 214, 217 (Ind. Ct. App. 1987) (citation omitted).

117. *Jones*, 734 N.E.2d at 287.

V. PUBLIC POLICY CONCERNS

Saving the lives of newborns by allowing mothers to leave infants with emergency medical services providers implicates several public policy concerns that can be furthered by granting the mother immunity. First, the state has an interest in facilitating the adoption of children. Second, it is the legislature's responsibility to dictate public policy. The final and most important public policy concern is the state's interest in the welfare of children.

A. The State's Interest in Facilitating the Adoption of Children

The State of Indiana has demonstrated its interest in facilitating the adoption process. It has provided a small window of time for the putative father to register and has made it difficult for a mother to change her mind about abandoning her child. Additionally, "the state has a strong interest in providing stable homes for children, and early, permanent placement with adoptive families furthers the interests of both the child and the state."¹¹⁸ By applying the policies and procedures already in place with abandoned children, the state can facilitate the adoption of children abandoned in emergency rooms. At the same time, mothers who abandon their children with emergency services providers can do what they believe is in the best interest of their children.

B. The Legislature is the Proper Authority to Dictate Public Policy

The legislature is the proper authority to dictate public policy—not prosecutors, agencies or courts.¹¹⁹ "States frequently make differing policy decisions and pass laws accordingly. It is not [the court's] role to consider legislative judgment or to weigh policy decisions . . ."¹²⁰ It seems that the courts would be obliged to follow the determinations of the legislature, and not the informal amnesty guarantees provided by prosecutorial discretion.

C. The State's Interest in Protecting Children

The primary concern of the courts in an adoption proceeding is the best

118. *B.G.*, 509 N.E.2d at 217. In 2000, the Indiana Court of Appeals reaffirmed the duty of the putative father to step forward and register or risk not receiving notice of the potential adoption.

During the first months of his son's life, [the putative father's] only connection to the infant was biological. That he now asserts that he was willing to be a custodial parent, had he only known, adds nothing to his argument, even if we accept the dubious proposition that a willingness so abstract and amorphous has some legal significance. *Jones*, 734 N.E.2d at 286 (quoting *Robert O. v. Russell K.*, 604 N.E.2d 99, 103-04 (N.Y. 1992)).

119. The Indiana courts have yet to consider a charge of abandonment for a mother who abandoned her infant with an emergency medical services provider.

120. *Spencer v. O'Connor*, 707 N.E.2d 1039, 1045 (Ind. Ct. App. 1999); *see also Hovey v. Foster*, 21 N.E. 39, 41 (Ind. 1889) (public policy is a matter of legislative discretion); *McFarland v. McFarland*, 40 Ind. 458, 461 (1872) (the duty to make law is for the legislature, not the courts).

interest of the child.¹²¹ Similarly, the primary focus of a state allowing immunity for mothers who abandon their newborns should be saving the life of the child. “We’ve got to do something that will make us think more of the children, because they’re paying with their lives.”¹²² Indiana has an interest in protecting its children. The mother abandoning her child with an emergency medical services provider does so because she feels that abandoning the child is in the best interest of the child. The interest in the welfare of children, shared by the state and the mother who chooses to leave her baby with an emergency medical services provider, can be furthered without punishing the mother for the abandonment.

CONCLUSION

Indiana should provide immunity from prosecution for abandonment to mothers who abandon their newborns within forty-five days of birth to an emergency medical services provider. California, Minnesota, Ohio, and South Carolina have adopted a similar immunity provision.¹²³ Immunity from prosecution would provide a mother an opportunity to freely choose to act in the best interest of her child. Indiana should also draft statutes in a manner that promotes certainty in the law.

A continuing public relations campaign informing the public about the change in the child abandonment statute would lead to increased education and a better chance for intervention before the birth.¹²⁴ Teenagers must be aware of the option of abandonment to a medical services provider before giving birth.¹²⁵

121. “The best interests of the child are the primary concern in an adoption proceeding.” *B.G.*, 509 N.E.2d at 217; *see also* *P.D. v. D.H.*, 661 N.E.2d 873, 877 (Ind. Ct. App. 1996); *Unwed Father v. Unwed Mother*, 379 N.E.2d 467, 472 (Ind. Ct. App. 1978).

122. 20/20: *The Innocent Ones* (ABC television broadcast, Aug. 10, 2000), transcript available at http://www.abcnews.go.com/onair/2020/transcripts/2020_000810_projectcuddle_trans.html (on file with the *Indiana Law Review*).

123. *See* NAT’L CONF. OF STATE LEGS., *supra* note 11.

124. Minnesota’s safe harbor movement has increased education. “Hospitals . . . [state] that their ob-gyn departments are getting more calls from women saying that they’re pregnant, it’s a secret, and they need some help.” Ode, *supra* note 29.

125. In Indiana, it may be difficult for teenagers to learn of the option available to them. James Hmurovich, the director of Indiana’s Division of Family and Children, was quoted as saying, “[I]n publicizing [the defense to prosecution for child abandonment], officials also must be careful to stress that women . . . can avoid a baby crisis We don’t want to make it seem that our society thinks it’s acceptable to abandon a child We want this to be our safety net” Penner, *supra* note 3. Perhaps one place to start in planning the publicity campaign would be to target the Indiana counties with the highest rate of teen pregnancy. In 1997 those counties were: Blackford, Cass, Clay, Crawford, Decatur, DeKalb, Elkhart, Fayette, Howard, Jackson, Jay, Jennings, Lake, LaPorte, Marion, Marshall, Miami, Noble, Orange, Scott, Spencer, Washington, and Vanderburgh. THE NATIONAL CAMPAIGN TO PREVENT TEEN PREGNANCY, *Fact Sheet: Teen Pregnancy and Childbearing in Indiana*, at <http://www.teenpregnancy.org/usa/in2.htm> (last visited Sept. 6, 2001).

Connecticut, Florida, New Jersey, and South Carolina have legislation in place to educate the public about the abandoned baby legislation either through a media campaign or some other form of public notice.¹²⁶ The trauma of giving birth, especially at home, can cause the woman to act in an arguably “unintentional”¹²⁷ manner that can lead to harm to her infant.¹²⁸ Thus, the mother must be aware of the safe abandonment option before giving birth.

There is evidence that legislation granting mothers a defense to prosecution if they abandon their children with an emergency medical services providers is helping to save lives. Although states that have such legislation in place have not yet had many women choose to invoke the defense, with one exception women are not abandoning their children in unsafe situations either.¹²⁹ By settling the law in this area in favor of immunity from prosecution for abandonment in

On the other hand, the counties with the lowest rate of teenage pregnancy should be targeted because the sense of shame that can lead to abandonment could be stronger in those counties. The counties with the lowest teenage birth rates in 1997 were as follows: Adams, Boone, Brown, Dearborn, Delaware, Dubois, Franklin, Hamilton, Hancock, Hendricks, Jasper, Johnson, Knox, LaGrange, Monroe, Ohio, Porter, Posey, Putnam, Tippecanoe, Tipton, Union, and Warrick. *Id.*

126. NAT’L CONF. OF STATE LEGS., *supra* note 11.

127. Due to the trauma of home birth, especially when the mother is in denial or unaware that she is pregnant, many argue that a mother who kills her newborn does not have the requisite mental state to form intent. “[W]hen the teen gives birth in a panic, then acts rashly by killing her baby, her culpability lies somewhere between criminal negligence and manslaughter, i.e., recklessness.” Fazio & Comito, *supra* note 27, at 3150 (footnotes omitted). Even disposing of the body does not show knowledge of guilt. *Id.* This is further proof that the education and the knowledge of the option of choosing life for the baby needs to be addressed with the pregnant woman before giving birth. If a woman is aware that she can leave the child with an emergency medical services provider after the birth, she may not be in such a state of panic immediately following childbirth because she knows there is an option available to her.

[M]ost neonaticide defendants do not plan to kill their babies. Quite to the contrary, everything about the circumstances surrounding labor and delivery in these cases speaks to the sudden and impulsive nature of the mother’s response. Although one might argue that the defendant was negligent in her failure to anticipate the impending birth of a child, and in her failure to take precautions to insure the baby’s survival, this hardly can be seen as premeditated murder. At best, this failing makes her reckless.

Oberman, *supra* note 30, at 80 (footnote omitted).

128. At least two authors have proposed a “neonaticide syndrome defense” which would require the woman accused to produce “evidence that at the time the balance of her mind was disturbed by the birth . . . not that the disturbance was sufficiently severe to deprive her of knowledge of the nature and quality of her act, or knowledge of its wrongfulness, or the capacity to control herself.” Fazio & Comito, *supra* note 27, at 3152 (footnote omitted).

129. See NAT’L CONF. OF STATE LEGS., *supra* note 11. The experiences of four states, Alabama, New Jersey, New York and Texas, are profiled. Although none of those states have adopted *immunity* from criminal prosecution for mothers who abandon their newborns, their results can be proof that a clearly defined statute can help save lives. *Id.*

limited circumstances and by educating¹³⁰ and promoting the law as an option to save babies' lives, Indiana can codify the public policy of the state and help mothers in desperate situations to allow their children the opportunity to be adopted instead of being left alone in dangerous settings.

130. For example:

Since we found that infants are most likely to be killed during the first few months of life, the identification of risk factors and interventions must take place during pregnancy, at the time of delivery, and in the immediate postpartum period The identification of risk factors for infant homicide may also be appropriate in prenatal clinical settings However, these interventions have not been evaluated for their effect on the abuse of infants after pregnancy.

Overpeck et al., *supra* note 28, at 1215 (footnotes omitted). Further, there is evidence that intervention and education do help reduce child neglect. "[H]ome visitation by trained nurses during pregnancy . . . reduced rates of state-verified cases of child abuse and neglect among first-born children of unmarried adolescents of low socioeconomic status." *Id.*

GIVING UNTIL IT HURTS: PRISONERS ARE NOT THE ANSWER TO THE NATIONAL ORGAN SHORTAGE*

WHITNEY HINKLE**

This Note argues that prisoners, whether executed or living, should not become organ donors. The introduction acknowledges the shortage of transplantable organs in the United States and the steps that have been taken to ameliorate this crisis. Part I discusses the procurement of organs from executed prisoners, beginning with a brief examination of China, a country where this type of procurement is routinely practiced. Part I also examines organ procurement legislation pertaining to executed prisoners. Finally, Part I asserts the reasons that prisoners should not become donors, including the dead donor rule, the ban against physicians as executioners, the Oath of Hippocrates, the risk of transmissible diseases, and the negative perception that would result if organ procurement was tied to executions. Part II of this Note discusses prisoners donating their organs in return for mitigated sentences. Part II then argues that this practice should not be adopted because of the lack of informed consent and voluntary choice. Finally, Part III of this Note introduces potential solutions to the national shortage of transplantable organs. Specifically, this Part discusses the possibility of maintaining a voluntary system, moving to a presumed consent system, and using financial inducements to create a larger supply of transplantable organs.

INTRODUCTION

The need for organs is far greater than the available supply. In 1999, the total number of organs recovered for donation by the United Network for Organ Sharing (UNOS)¹ was 10,538.² However, the UNOS national patient waiting list for organ transplants increased to seven times the amount recovered by the year 2000.³ “The gap between need and supply of organs also reflects the fact that while the number of transplants each year has been increasing, the number of waiting list registrations has been growing twice as fast.”⁴ Although startling,

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1. WILLIAM CURRAN ET AL., *HEALTH CARE LAW AND ETHICS* 767 (Epstein et al. eds., 5th ed. 1998). “UNOS is a membership organization that includes the [sixty-nine] organ procurement organizations throughout the country, as well as transplant surgery centers, medical laboratories that perform tests for organ matching, volunteer and advocacy groups, donors and donor families, transplant recipients and patients awaiting a transplant.”

2. United Network for Organ Sharing, *Critical Data: U.S. Facts About Transplantation*, http://www.unos.org/Newsroom/critdata_main.htm (n.d.) (basing this statistic on the UNOS Scientific Registry data as of June 10, 2000).

3. *Id.* (showing that the waiting list totaled 71,366 as of August 26, 2000).

4. CURRAN ET AL., *supra* note 1, at 721 (“While the number of waiting list registrations rose from 16,000 to 50,000 between 1988 and 1996, the number of transplants rose from 12,800 to

these figures underestimate the problem.

Many individuals in need of a new organ are never placed on a local, regional, or national waiting list.⁵ Transplant centers take into account many factors before assigning an individual to a waiting list. For instance, the centers consider the likelihood that the transplant surgery will go well, the length of time that the recipient will benefit from the transplant, and the quality of life that the recipient will experience post-transplant.⁶ Moreover, experts predict that “dozens of people probably die annually because they don’t have enough money for the operations or because they are considered too old to be worthy candidates.”⁷

More organ donors must be located to balance the disheartening figures of organ recovery and discontinue the ranking system inherent in the waiting list process. “The only solution to the ever widening gap between the number of organs available for transplantation and the number of patients waiting is to substantially increase the number of suitable organ donors identified and recovered.”⁸ Furthermore, a larger pool of organs would assure every individual in need a spot on a waiting list.

Recovering a larger number of organs, nonetheless, is an extremely difficult task under the present national system. Volunteerism is the current method used by the United States to recover transplantable organs. It is the belief of some transplant centers, however, that “relying on people’s altruism is naïve.”⁹ One transplant center director said, “[t]here’s an attitude of ‘Why should I help anybody else?’ And even worse than that, they’re suspicious of those who do.”¹⁰ Because of the belief that volunteerism is an insufficient means for closing the gap between organ need and supply, the national campaign to recover more organs has triggered inquiries into a variety of irrational, unworkable organ procurement methods.

The United States is not the only nation faced with an organ shortage and irrational proposed remedies. Australia is suffering from a national organ

20,200.”). See also Gloria Taylor & James Wolf, SCI. MUSEUM OF VA., *Organ/Tissue Donation and Transplantation*, <http://www.smv.org/prog/B2Kprimorgtrans.htm> (last updated July 15, 1999) (stating that the number of persons in need of an organ transplant has increased more than 100% since 1990).

5. CURRAN ET AL., *supra* note 1, at 720.

6. *Id.* at 767. See also Delthia Ricks, *Dying Woman’s Dream: Making Transplant List; The Sanford Woman’s Plight Illustrates How Some People Who Need Life-Saving Help Never Make the Cut*, ORLANDO SENTINEL, June 29, 1995, at A1 (noting that a UNOS spokeswoman suggested that medical and psychological tests need to be administered and the amount of family support considered when deciding who makes it onto a waiting list).

7. Ricks, *supra* note 6, at A1.

8. Taylor & Wolf, *supra* note 4.

9. Marcia Mattson, *Looking for Ways to Increase Organ Donation*, FLA. TIMES-UNION, May 9, 2000, at C1 (quoting Thomas Peters, director of the Jacksonville Transplant Center, who stated that some individuals view organ retrieval as an act of punishment).

10. *Id.* (quoting Thomas Peters).

shortage and has recently been exposed to some illogical ideas intended to increase the number of donors. The Australian government, for example, was recently faced with opposition to its introduction of "mandatory seat belt laws due to the detrimental effect it would have on the transplant front."¹¹ This example shows that at least some individuals, who are involved in a national campaign to recover more transplantable organs for their country, only think of the innocent lives that could be saved, rather than other adverse effects of their efforts. Although a larger number of donors must be immediately located in the United States, utilizing prisoners, similar to opposing mandatory seat belt laws, is an irrational, unworkable proposal.

It is undisputed that the national search for more organ donors is a necessary and worthy cause. "The science and technology surrounding organ recovery and transplantation have advanced rapidly since its early development in the 1950s. No longer considered experimental, transplantation saves lives."¹² State governments first addressed the need for organ donors when they approved the Uniform Anatomical Gift Act (UAGA) of 1968, which was designed to standardize the process of organ donation and removal.¹³ This Act did not generate the expected results; therefore, the UAGA was amended in 1987 to increase the number of potential donors.¹⁴ The federal government joined the campaign in 1984 by passing the National Organ Transplant Act (NOTA).¹⁵ The

11. Troy R. Jensen, *Organ Procurement: Various Legal Systems and Their Effectiveness*, 22 HOUS. J. INT'L L. 555, 577 (2000).

12. Taylor & Wolf, *supra* note 4.

13. Laura-Hill M. Patton, *A Call for Common Sense: Organ Donation and the Executed Prisoner*, 3 VA. J. SOC. POL'Y & L. 387, 389 (1996).

The 1968 UAGA provided that individuals at least eighteen years of age could make or refuse to make anatomical gifts at death. If the decedent had neither made a gift nor indicated any opposition to making a gift, the decedent's family could authorize a gift on behalf of the decedent. The UAGA provided that gifts not revoked by the donor during life were irrevocable after death, and the execution of the donor's wishes did not require the consent of the donor's family. Furthermore, the UAGA provided that if the gift was made through a will or other document, the gift became effective upon the donor's death without being subject to the probate process.

Andrew C. MacDonald, *Organ Donation: The Time Has Come to Refocus the Ethical Spotlight*, 8 STAN. L. & POL'Y REV. 177, 178 (1997).

14. MacDonald, *supra* note 13, at 178 (stating that the UAGA of 1987 added tools designed to guide the implementation and execution of the law by requiring hospitals to make a routine inquiry on whether an admitted patient wants to donate).

15. *Id.*

NOTA created the Division of Organ Transplant (DOT) as a division of the Department of Health and Human Services. DOT is responsible for administering NOTA, coordinating organ procurement activities, and encouraging donation. DOT is also responsible for the Organ Procurement and Transplantation Network (OPTN), the Scientific Registry, and grants to Organ Procurement Organizations (OPOs). OPOs are private health care institutions that receive federal grants for participating in organ

effectiveness of the UAGA, however, has recently been under fire as a result of "the current scarcity of human organs available for transplant."¹⁶ Thus, other avenues, including the use of condemned prisoners as organ donors, are being proposed to solve this countrywide problem.

In some societies, the use of prisoners as organ donors might be considered beneficial. "The human body has approximately thirty transplantable parts."¹⁷ Prisoners, as living donors, could donate non-vital organs, whereas executed prisoners could be used to provide vital as well as non-vital organs.¹⁸ This information tends to suggest that the organs of prisoners, whether dead or alive, could be used to save many lives. Unfortunately, in our society numerous barriers exist that prohibit the use of these organs for the purpose of donation.

Prisoner's organs cannot be utilized because of legal, medical, and ethical barriers. The UNOS Ethics Committee "opposes any strategy or proposed statute regarding organ donation from condemned prisoners until all of the potential

transplant programs.

The OPTN established by NOTA was designed to create a national waiting list and a computerized method of matching organs with people on that list. The job of setting up and operating the OPTN was contracted out to the United Network for Organ Sharing (UNOS).

Id. at 178-79.

16. Patton, *supra* note 13, at 390. See also *Fixit; A Single Organ Donor Can Save Many Other Lives*, MINNEAPOLIS STAR TRIB., Jan. 12, 1997, at 9E (stating that "[a] name is added to the national waiting list every [eighteen] minutes"); Lisa R. Kory, *Altruism Should Prompt Organ Donation*, PLAIN DEALER (Cleveland, OH), June 16, 1999, at 8B (stating that "[e]ach day [ten] Americans waiting for organ donations die"); Mattson, *supra* note 9 (stating that "[e]very day, [thirteen] people die waiting for an organ); Ricks, *supra* note 6 (estimating that each year 2000 Americans die while waiting for organ donations); Taylor & Wolf, *supra* note 4 (stating that "[f]or every patient who undergoes a successful transplant, two new patients begin their wait for an organ transplant"); Elizabeth Zubritsky, *Thousands Await Life-Saving Organs*, CHAPEL HILL HERALD, Apr. 25, 1995, at 1 (reporting that "nearly 3000 patients died while waiting for transplants [in 1994]").

17. Gloria J. Banks, *Legal & Ethical Safeguards: Protection of Society's Most Vulnerable Participants in a Commercialized Organ Transplantation System*, 21 AM. J.L. & MED. 45, 46 (1995). See also *id.* at 46 n.12 (citing Lloyd R. Cohen, *Increasing the Supply of Transplant Organs: The Virtues of a Futures Market*, 58 GEO. WASH. L. REV. 1, 3 (1989) (noting that there are at least twenty-five transplantable parts including the inner ear, a variety of glands (pancreas, pituitary, thyroid, parathyroid, and adrenal), blood vessels, tendons, cartilage, muscles (including the heart), testicles, ovaries, fallopian tubes, nerves, skin, fat, bone marrow, blood, livers, kidneys and corneas)).

18. Banks, *supra* note 17, at 53 (noting that vital organs consist primarily of organs that are irreplaceable and essential in preserving the life of the donor such as the heart, lungs, liver, pancreas, stomach and kidneys, whereas non-vital organs are those which can be removed from the donor without causing death due to their absence, such as one of two kidneys and a dissected portion of a functioning liver).

ethical concerns have been satisfactorily addressed.”¹⁹ When reaching its decision, the Committee considered the effects of such a law and determined that only a small number of organs would be recovered, and donation rates would most likely decrease as a result of the stigma attached to donation.²⁰ A beneficial way to understand why proposals of this practice should be immediately abandoned in the United States is to discuss another country that has shaped its existence.

I. ORGAN PROCUREMENT FROM EXECUTED PRISONERS

A. China's Practice

In China, organs from executed prisoners are habitually removed, resulting in tens of thousands of harvested organs.²¹ The Chinese government, however, has repeatedly denied such a widespread practice stating that it occurs “‘only in rare instances’ and ‘with the consent of the person’ to be executed.”²² Chinese law allows the procurement to occur, but only if the prisoner’s body is not claimed; if the prisoner has consented to the organ removal; or, if the prisoner’s family has given consent.²³ The facts, nevertheless, support a tainted system.

The Chinese government does not abide by its rigid law concerning the procurement of organs from executed prisoners. Organ procurement, for instance, is conducted with the acquiescence of Chinese government officials; organs are rarely obtained with the consent of the prisoner; and families are rarely informed that the prisoner’s organs will be removed.²⁴ Furthermore, China’s procurement of organs from executed prisoners is motivated by greed.²⁵ Although life-necessary organs cannot be sold in the United States,²⁶ organs in China are given to the individuals willing to pay the highest prices.²⁷ For example, between 2000 and 3000 organs are obtained from Chinese prisoners per

19. United Network for Organ Sharing, *UNOS Ethics Committee: Ethics of Organ Donation from Condemned Prisoners*, at <http://www.unos.org/resources/bioethics%5Fwhitepapers%5Fconvictdonors.htm> (n.d.).

20. *See id.*

21. Dan Burton, Editorial, *Outraged at China's Sale of Organs*, INDIANAPOLIS STAR, June 29, 1998, at A5.

22. Cesar Chelala, *Prospect of Discussions on Prisoners' Organs for Sale in China*, 350 LANCET 1307, 1307 (1997).

23. Patton, *supra* note 13, at 425 (citing Allison K. Owen, *Death Row Inmates or Organ Donors: China's Source of Body Organs for Medical Transplantation*, 5 IND. INT'L & COMP. L. REV. 495, 499-502 (1995)).

24. Chelala, *supra* note 22; Patton, *supra* note 13, at 425.

25. Burton, *supra* note 21, at A5 (noting that “[d]esperate people throughout Asia are being charged \$40,000 or more for organs”).

26. *See* CURRAN ET AL., *supra* note 1, at 722.

27. *See* Chelala, *supra* note 22.

year, and those organs are usually offered for around \$30,000 each.²⁸ China's practice, moreover, is unlikely to end.

Two examples suggest that the Chinese government may not intend to take any steps to discontinue the procurement of organs from executed prisoners. First, China's means of execution is still a gunshot to the head,²⁹ which conveniently allows this practice to continue. A gunshot to the head is "conducive to transplants because it does not contaminate the prisoners' organs with poisonous chemicals, as lethal injections do, or directly affect the circulatory system. . . ."³⁰ Second, it has been implied that this practice has sharply increased the number of executed convicts in China.³¹ "Even more disturbing is the fact that as the traffic in prisoners' organs has grown, so has the number of executions. Between 1988 and 1996, the number of kidneys transplanted in China rose fourfold. Between 1990 and 1996, the number of executions grew by 600 percent."³² Thus, there is an understandable anxiety among the Chinese that the procurement of the prisoners' organs is not an "unanticipated benefit."³³ Instead, this practice appears to be the main reason for the execution. The United States, consequently, should not adopt this practice.

China's system of procurement from executed prisoners is unethical, illegal, and morally revolting. Although this system has been attacked as violating human rights policies and the international standards of medical ethics,³⁴ this is only the outer core of its problems. If the United States were to implement such a system, the sale of organs would become a normal practice, the number of executions would rise without justification, and the organs of executed prisoners would be taken without consent. For these reasons, as well as the others discussed later in this Note, China's practice of organ procurement from executed prisoners cannot be adopted by the United States.

B. Origin in the United States

State legislators have proposed using prisoners as organ donors, particularly

28. *Id.*; Burton, *supra* note 21, A5 (stating that "[i]n 1996 alone, China earned almost \$100 million in hard currency from organ sales"); Christine Gorman, *Body Parts for Sale: An FBI Sting Operation Uncovers What Chinese Activists Say is a Grisly Trade: Human Organs for Cash*, TIME, Mar. 9, 1998, at 76 (stating that after an execution in China "[d]octors at military hospitals . . . transplant the organs into wealthy foreigners willing to pay anywhere from \$10,000 to \$40,000 for the operation").

29. Thomas Fuller, *Transplant Lifeline to Death Row: Organs of Executed Convicts in China Sold to Malaysians*, GUARDIAN (London), June 16, 2000, at 2.

30. *Id.*

31. See Chelala, *supra* note 22, at 1307; Gorman, *supra* note 28, at 76 (stating that "[s]ome activists fear that Chinese officials may have broadened the kinds of crimes punishable by death in order to line their own pockets").

32. Burton, *supra* note 21, at A5.

33. Patton, *supra* note 13, at 426.

34. Chelala, *supra* note 22, at 1307.

death row inmates. A Florida state legislator offered the most recent proposal. In 2000, state Representative William F. Andrews introduced Florida House Bill 999.³⁵ The original version of the bill entitled, "An Act Relating to Anatomical Gifts by Capital Defendants," would have authorized death row prisoners to donate their organs upon execution.³⁶ Criticism to the bill, however, came from a variety of organ procurement organizations. Opposition, for example, came from the general counsel for Lifelink, a Tampa organ procurement organization, who cited medical, scientific and constitutional objections.³⁷ Representative Andrews subsequently revamped that version of the bill because "a host of ethical and scientific issues" had to be resolved before it could become law.³⁸ The bill presently states that "convicts will be given the opportunity to decide whether they want their organs to be donated, should they die in prison."³⁹ The Florida House Crime and Punishment Committee approved the modified measure, yet the bill has to pass three more committees before it hits the House floor for a full vote.⁴⁰

Florida is not the only state that has considered this avenue to increase donation rates. Almost two decades ago, the California state legislature nearly faced a similar suggestion. "In 1984, a member of the California state judiciary committee prepared to introduce Senate Bill 1968, which would have provided for organ donation by condemned prisoners."⁴¹ This bill, nonetheless, was never proposed as a result of California's reluctance to execute its prisoners as well as the low percentage of organs that the proponent thought could be procured from this class.⁴² Then, in 1987, "in Kansas, state Representative Martha Jenkins introduced House Bill 2062, which . . . provided for organ donation by the condemned [prisoner]," but it did not prove to be a successful plan.⁴³ A similar proposal was also unsuccessful in Indiana. In that state, "representative Padfield introduced a resolution in 1995 urging Indiana's Legislative Council to consider

35. Jeff Testerman, *Organs of Condemned Sought for Transplant*, ST. PETERSBURG TIMES, Mar. 26, 2000, at 1B; see also Mattson, *supra* note 9, at C1.

36. Testerman, *supra* note 35, at 1B.

37. *Id.*

38. *Id.* See also H.R. 999, 2000 Leg., 102d Reg. Sess. (Fla. 2000) (showing the original version of House Bill 999 that died in committee); S.B. 1970, 2000 Leg., 102d Reg. Sess. (Fla. 2000) (showing that a bill similar to the original House Bill 999 died on calendar).

39. Gwyneth K. Shaw, *Prisoners as Donors Could Flop; If a Death-Row Inmate Is Executed, There Is No Way To Keep the Heart Beating and Harvest Body Organs*, ORLANDO SENTINEL, Apr. 5, 2000, at D1. See also Mattson, *supra* note 9, at C1 (stating that the bill "would simply require the Department of Corrections to give donor cards to every prisoner").

40. *Florida: Bill Allows Inmates To Donate Organs Upon Death*, American Health Line, Apr. 5, 2000.

41. Patton, *supra* note 13, at 432 (citing JACK KEVORKIAN, *PRESCRIPTION: MEDICINE* 163 (1991)).

42. *Id.*

43. *Id.* at 433.

organ removal from condemned prisoners.”⁴⁴ Furthermore, the former Attorney General of Texas, Jim Mattox, considered a similar proposal, yet no such law ever passed in that state.⁴⁵

Finally, in 1996, two states, Arizona and Georgia, considered the issue of executed prisoners as organ donors. Arizona state Representative Bill McGibben proposed a measure that would allow condemned inmates a choice between lethal injection or having their organs harvested for transplant.⁴⁶ McGibben argued, “if these guys can do something positive for society on their way out, why not?”⁴⁷ Despite his efforts, “the bill failed to pass out of committee.”⁴⁸ In Georgia, state Representative Teper proposed another bill, which provided the condemned prisoner with a choice between death by electrocution or guillotine.⁴⁹ This bill would have allowed those who chose death by guillotine to be organ donors; however, it did not succeed.⁵⁰ Representative Teper, in addition to that proposed bill, submitted a stay of execution for Georgia death row inmate Larry Lonchar. Lonchar, who was slated to die by electrocution, as required under Georgia law, stated that “he would like to donate his organs if an alternative method of execution would be allowed.”⁵¹ Ironically, Lonchar specifically requested to donate his kidney to the detective who supervised his investigation.⁵² Lonchar’s request, while raising many ethical and practical concerns, ultimately failed.⁵³ Electrocution remains the only method of execution in Georgia.⁵⁴ There are numerous reasons as to why these respective bills failed to become law. These reasons will be discussed in the remainder of this section and will give further support to the argument that legislation proposing the use of executed

44. *Id.* at 431-32; *see also id.* at 432 n.210 (recounting a telephone interview with Padfield in 1995 in which Padfield stated that Indiana’s Interim Committee on Criminal Justice convened without informing him and summarily rejected his proposed legislation without hearing any testimony); *id.* (citing 1995 Ind. Act 41) (calling “for a study of execution methods that do not destroy human organs”).

45. *Id.* at 433.

46. Pamela Manson, *Donor Group: Inmate Organs Unsuitable*, ARIZ. REPUBLIC, Jan. 12, 1996, at B1; Patton, *supra* note 13, at 432 n.213 (citing 1996 Ariz. Sess. Laws 2271 and 2007, which proposed an amendment to Arizona’s Constitution to provide for organ donation by the executed prisoner).

47. Patton, *supra* note 13, at 432.

48. *Id.*

49. *Id.* at 432 n.211 (citing 1996 Ga. Law 1274).

50. *See id.*

51. Marla Jo Brickman, *As Execution Nears, Donor Chance Fading: Death Row Inmate Doesn’t Wish to Result in Delay*, ATLANTA J. & CONST., June 20, 1995, at 4B.

52. Mark Curriden, *Inmate’s Last Wish Is to Donate Kidney; His Quest Opens Debate over Ethics of Harvesting Executed Convicts’ Organs*, 82 A.B.A. J. 26, 26 (1996).

53. *See generally* Angela Carson, *Lonchar v. Thomas: Protecting the Great Writ*, 13 GA. ST. U. L. REV. 809 (1997).

54. Patton, *supra* note 13, at 432 n.211 (citing H.B. 1113 (Ga. 1996)) (calling for execution by lethal injection and was later withdrawn from committee).

prisoners as organ donors should not be adopted.

C. Problems with Procurement from Executed Prisoners

Some cadaveric organs are not capable of being procured for transplantation because of the method of death. "Many potential organ donors are victims of accidents and violent crimes that result in some type of head injury."⁵⁵ Public policy, moreover, directed to reduce these very accidents and crimes has resulted in a decrease in the number of cadaveric organs available for donation.

The number of persons who die in a way that leaves their organs suitable for transplantation is being reduced by the enactment of laws requiring seat belts or motorcycle helmets, the use of air bags in automobiles, gun control legislation, and the stricter enforcement of laws that prohibit driving under the influence of alcohol.⁵⁶

Although these laws are necessary for public welfare and safety, they put more pressure on the use of controversial classes of individuals as cadaveric donors such as anencephalic children⁵⁷ and executed prisoners.

Executed prisoners, however, are one class of potential cadaveric donors that cannot be utilized because their organs would be destroyed during the act of execution.⁵⁸ Execution destroys organs.⁵⁹ Although many barriers prohibit the use of prisoners as cadaveric organ donors,⁶⁰ the main barrier is that organ procurement centers would not be able to locate "cadavers that [had] fresh organs which [could] be used by the intended donee" from this population.⁶¹ First, the organs of executed prisoners would not be "fresh" because of the amount of time that transpires before the pronouncement of death.⁶² Second, even if that time frame could somehow be reduced, the organs would still not be useful to the intended donee because the various methods of execution in the United States, including lethal injection, electrocution, gas, hanging, and firing squad, all

55. Taylor & Wolf, *supra* note 4 (noting that patients who become brain dead from bleeding within the brain, patients who suffer strokes, patients who have primary brain tumors with no metastasis, patients with anoxic brain injury, patients who overdose on drugs, patients who die from smoke inhalation, patients who drown, or patients who go into cardiac arrest are potential donors).

56. CURRAN ET AL., *supra* note 1, at 721.

57. *In re Baby K*, 16 F.3d 590, 592 (4th Cir. 1994). Anencephaly is "a congenital malformation in which a major portion of the brain, skull, and scalp are missing." These children only have a brain stem, will never be conscious, and normally die within a few says after birth. *See id.*

58. Rorie Sherman, "Dr. Death" Visits the Condemned, NAT'L L.J., Nov. 8, 1993, at 11 (noting that one of Dr. Jack Kevorkian's objectives is to extract reusable organs of death row inmates before execution damages them).

59. *Id.*

60. *See Banks, supra* note 17, at 58.

61. *Id.*

62. Patton, *supra* note 13, at 401.

damage organs and render them useless for transplantation purposes.⁶³ No method of execution exists that would allow the procurement of prisoners' organs for transplantation.⁶⁴ Moreover, adding another method of execution to this nation's impressive list would not solve the national organ shortage.

Organ procurement should not become a new means of execution. "The death penalty is highly problematic morally, legally, and socially in those states that allow it; it would become even more so if it also served as a method of organ procurement."⁶⁵ Three major arguments block the adoption of organ procurement as a new method of execution. The dead donor rule would have to be modified, physicians would have to stand in the executioner's shoes, and the Oath of Hippocrates would have to be ignored.

1. *The Dead Donor Rule, Physicians as Executioners, and the Oath of Hippocrates.*—The act of organ donation as a means of execution is a very contentious proposal, especially within the medical community. The present means of execution available in the United States leave the prisoners' organs useless for transplantation purposes.⁶⁶ Organ donation as a means of executing prisoners, therefore, would be the only possible way to procure prisoners' organs for transplantation.⁶⁷ This means of execution, however, ignores the dead donor rule, which is "the ethical and legal rule that requires that donors not be killed in order to obtain their organs."⁶⁸

The dead donor rule is based on society's respect for human life.⁶⁹ "According to the law of every state, organs necessary for life (e.g., the heart or an entire liver) cannot be removed from a person for transplantation unless the

63. *Id.*

64. See Testerman, *supra* note 35, at 1B.

65. John A. Robertson, *The Dead Donor Rule*, 29 HASTINGS CENTER REP., Nov. 1, 1999, at 6.

66. See discussion *supra* Part I.C.

67. Execution by organ retrieval would be performed as follows:

The condemned prisoner would request this method five to seven days before the execution date. At the time selected for execution, the prisoner would be taken from death row to the prison hospital and strapped on a gurney as in preparation for execution by lethal injection. Witnesses to the execution, including the victim's family, could view the insertion of intravenous lines and administration of anesthetic outside of the operating room. When the prisoner became unconscious, he would be moved to an operating room where the transplant team would then remove all his organs. When organ removal was completed, ventilatory or other mechanical assistance would be terminated, as occurs in retrieval from brain-dead, heart-beating cadavers. Death would be pronounced as having occurred either at the time that the heart and lungs were removed, or when mechanical assistance was terminated. The retrieved organs would then be distributed to consenting recipients in accordance with existing rules for distributing organs.

Robertson, *supra* note 65, at 6.

68. *Id.*

69. *Id.*

person is dead”⁷⁰ Therefore, the rule protects the interests of living persons; it provides assurances to living persons that having their organs removed will not shorten their lives; and it preserves the value of respect for life. The act of organ procurement as a means of execution would require a modification of the dead donor rule. Although the proponents of such a modification argue that the benefits from relaxing the rule in the case of executed prisoners outweigh the loss of respect for human life, they ignore the fact that a very small number of organs would be procured as a result of this extremely controversial modification.⁷¹ There are approximately fifty executions each year;⁷² therefore, the number of lives saved would be very small. Modifications of the rule would also result in other difficulties.

A relaxation of the dead donor rule would “require a concomitant relaxation in prohibitions against physicians killing.”⁷³ Physicians would have to participate in the organ procurement from executed prisoners given the complex medical nature of this proposed procedure.⁷⁴ However, this proposal is tainted with one major problem. Physicians, according to the American Medical Association (AMA), are prohibited from participating in executions.

From a utilitarian standpoint this would make sense; the anesthetizing of the condemned and the recovery of organs in the usual manner would produce optimum organs for transplantation. However, the cross-clamping the aorta and the ensuing cardiectomy, followed by the disconnection of the ventilator, create an unacceptable situation for the organ recovery team. It clearly places the organ recovery team in the role of executioner.⁷⁵

“To be used for transplant to needy patients, the organs of condemned criminals would have to be removed under anesthesia prior to formal execution, in effect making physicians executioners—something organ recovery physicians won’t countenance.”⁷⁶

Additionally, if the dead donor rule were modified, the Oath of Hippocrates

70. CURRAN ET AL., *supra* note 1, at 731 (giving IND. CODE ANN. § 29-2-16-2 (1998) as an example). The Uniform Declaration of Death Act (UDDA) reads: “An individual who has sustained either (1) irreversible cessation of circulatory and respiratory functions, or (2) irreversible cessation of all functions of the entire brain, including the brain stem, is dead.” James M. DuBois, *Non-Heart-Beating Organ Donation: A Defense of the Required Determination of Death*, 27 J.L. MED. & ETHICS 126 & n.2 (1999) (citing the PRESIDENT’S COMMISSION FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL AND BEHAVIORAL RESEARCH, *DEFINING DEATH: MEDICAL, LEGAL, AND ETHICAL ISSUES IN THE DETERMINATION OF DEATH* 73 (1981)).

71. See Robertson, *supra* note 65, at 6.

72. *Id.*

73. *Id.*

74. See Patton, *supra* note 13, at 403.

75. United Network for Organ Sharing, *supra* note 19.

76. Bette-Jane Crigger, *An Eye For an Eye: Donation of Death Row Inmates’ Organs*, 19 HASTINGS CENTER REP., Mar. 1989, at 3 (reporting Georgia’s bill was unsuccessful).

would have to be ignored. The Hippocratic Oath asserts that physicians should “[f]irst, do no harm.”⁷⁷ The Oath further declares, “I will . . . abstain from whatever is deleterious,” and “give no deadly medicine to any one if asked, nor suggest any such counsel”⁷⁸ Physicians are healers. The AMA, therefore, has constantly refused to give support to physicians participating in capital punishment because it is contrary to the Oath.⁷⁹ The AMA also believes that physician participation breaches society’s trust in the medical profession.⁸⁰ It believes that society would become doubtful of physician’s motives if they were to participate in capital punishment, and the trust between doctor and patient would be lost. Consequently, the AMA as well as other organizations take the position that such participation is unethical and grounds for sanctions.⁸¹ Although it can be argued that the AMA ambiguously defined the word “participation” in its resolution,⁸² it seems logical that an individual who actually causes the death of another by organ procurement is “participating.” Society’s interest in protecting the health of the individual is best served when physicians do not participate in executions. The health of the individual would be threatened if the organs of such a high-risk class were used for transplantation.

2. *High-Risk Group*.—Infectious diseases exist and continue to spread in correctional facilities.⁸³ Nearly all prisoners on death row have been involved in some type of risky activity, which has contaminated their organs with transmissible diseases. First, correctional facilities include a high concentration

77. Joel D. Kallich & Jon F. Merz, *The Transplant Imperative: Protecting Living Donors from the Pressure to Donate*, 20 IOWA J. CORP. L. 139, 139 (1994) (quoting STEDMAN’S MEDICAL DICTIONARY 716-17 (25th ed. 1990)).

78. The Oath of Hippocrates, at <http://www.humanities.ccny.cuny.edu/history/reader/hippoath.htm>.

79. David J. Rothman, *Physicians and the Death Penalty*, 4 J.L. & POL’Y 151, 153 n.3 (1995) (citing Sheryl Stolberg, *Doctor’s Dilemma: Physicians Attending Executions? Increasingly, Many Are Wrestling with Their Consciences—And Saying No*, L.A. TIMES, Apr. 5, 1994, at E1 (stating that “the AMA [has] concluded that doctors should have no role in executions other than to arrive afterward to certify that an inmate is dead”)).

80. Stacy A. Ragon, *A Doctor’s Dilemma: Resolving the Conflict Between Physician Participation in Executions and the AMA’s Code of Medical Ethics*, 20 U. DAYTON L. REV. 975, 998 (1995).

81. *Id.* at 991 (stating that the American College of Physicians, Physicians for Human Rights, the American Nurses Association, the American Public Health Association, the Society for Correctional Physicians, the National Commission on Correctional Health Care, and the World Medical Association join the AMA in its position).

82. Patton, *supra* note 13, at 394 (arguing that the resolution passed by the AMA against physician participation in executions left physicians free to define the word participation themselves).

83. D. Stuart Sowder, *AIDS in Prison; Judicial Indifference to the AIDS Epidemic in Correctional Facilities Threatens the Constitutionality of Incarceration*, 37 N.Y.L. SCH. L. REV. 663, 663 (1992).

of individuals with histories of illegal intravenous drug use.⁸⁴ Mandatory sentencing in drug offenses, for instance, has resulted in an extremely high percentage of drug offenders in the federal system.⁸⁵ Moreover, this high-risk activity does not stop once the drug offenders are incarcerated. A woman imprisoned at the California Institute for Women (CIW) reported that “there’s more dope in [CIW] than on the street.”⁸⁶ This activity of drug abuse within prison walls is able to continue with the help of drug smugglers, including visitors and prison guards.⁸⁷ Second, unsafe sexual practices also result in the transmission of diseases between inmates. “[B]oth consensual and coerced homosexual contact is a common occurrence in most, if not all, correctional facilities.”⁸⁸ Third, tattooing is another way prisoners’ organs could become contaminated. When multiple prisoners receive tattoos from the same unsterilized needle, there is an increased risk that those prisoners will acquire a transmissible disease. Prisoners’ organs are likely to be infected with tuberculosis, HIV, or hepatitis as a result of participating in any or all of these high-risk activities. Therefore, most prisoners are of no use to organ procurement centers or intended donees.⁸⁹ Federal organizations recognize that prisoners are a high-risk group and advise against using them as donors.

The Food and Drug Administration’s (FDA) Center for Biologics Evaluation and Research has advised blood and plasma centers not to accept prison inmates as donors.⁹⁰ The FDA reviewed a series of reports by the U.S. Department of Justice, the National Center for Disease Control and Prevention, and others, which found that the high-risk behavior of inmates “correlates with a high rate of infection among inmates and incoming prisoners with bloodborne transmissible agents, such as HIV and hepatitis viruses.”⁹¹ The FDA also forbids the use of prisoners as cadaveric organ donors because of this risk of transmitted diseases.⁹² An FDA spokesman said that “the reason for the FDA’s ban is that inmates often engage in high-risk activity, including intravenous drug use. ‘We have an overlapping system of safeguards. Even though the tests are good, they are not 100 percent accurate. We have to be certain.’”⁹³ Legislators should take

84. *Id.* at 666.

85. *Id.* at 667 (referring to a study conducted in San Diego, New York, Philadelphia, and Washington, D.C. that “reported that seventy percent of all arrestees had tested positive for the presence of one or more intravenous drugs in their bloodstream at the time of their arrests”).

86. *Id.*

87. *Id.* at 668.

88. *Id.*

89. See United Network for Organ Sharing, *supra* note 19.

90. *Blood Donor Criteria Revised to Exclude Prisoners; High Prevalence of Inmates Engaged in High-Risk Behavior for Blood-Borne Diseases*, 29 FDA CONSUMER 4 (1995).

91. *Id.*

92. Testerman, *supra* note 35, at 1B.

93. Twila Decker, *From Prison Cell, A Gift of Freedom*, ST. PETERSBURG TIMES, May 31, 2000, at 1D. See also Jeffrey A. Lowell, *Prisoner Organ Donation Is a Bad Idea*, ST. LOUIS POST-DISPATCH, Feb. 24, 1998, at B7 (stating that “no blood tests rule out the presence or absence of

the advice of the experienced individuals who make up the FDA rather than proposing organ donation laws based on little, if any, medical knowledge. Studies show, moreover, that most prisoners have transmissible diseases.

In reference to inmates, the National Commission on Acquired Immune Deficiency Syndrome has stated that “no other institution in this society has a higher concentration of people at substantial risk of HIV infection.”⁹⁴ A study conducted by the National Institute of Justice showed that the incidence rate of AIDS cases for the general public was 14.65 cases per 100,000 people compared to 202 cases per 100,000 in federal and state correctional facilities.⁹⁵ Prisoners who contract transmissible diseases, moreover, cannot donate their organs. The prevalence of HIV on death row makes prisoners’ organs only a minimal help to the national disaster, if any help at all. Florida’s Representative Suzanne Kosmas stated, “I just question the public policy reason for starting with those whose organs would be in the highest-risk end.”⁹⁶ The reality is that an organ infected with a transmissible disease could go undetected and be transplanted into an innocent individual. The organs of executed prisoners involve too great of a risk. Moreover, the coupling of executions and organ removal could lead to a negative perception by society.

3. *Minorities and the Discriminatory Application of the Death Penalty.*—An organ procurement policy for prisoners condemned to death will result in a negative perception of organ donation.⁹⁷ The national system, which is based on altruism, will be tainted if associated with the controversy over capital punishment. This negative perception will most likely lead to a decrease in organ donation rates, especially among minorities.⁹⁸ “Any notion that particular groups of people [are] receiving increased numbers of death sentences to provide organs for the rest of society would clearly make it difficult to attempt to obtain consent for altruistic donation from these groups.”⁹⁹ Statistics show, moreover, that the death penalty is applied inequitably among racial and ethnic groups.¹⁰⁰

The death penalty is used to discriminate against African-Americans. “The data indicate that blacks are five times more likely to be sentenced to death than whites convicted of similar crimes. . . .”¹⁰¹ The federal death penalty represents the “most arbitrary and racially discriminatory use of the death penalty in the nation.”¹⁰² For example, Janet Reno, the Attorney General for the Clinton

these viruses with 100 percent certainty. Transplant recipients on immunosuppressive medications are particularly susceptible to these potentially fatal viruses.”).

94. Sowder, *supra* note 83, at 666.

95. *Id.* at 668.

96. *Florida: Bill Allows Inmates to Donate Organs Upon Death*, *supra* note 40.

97. See Patton, *supra* note 13, at 411.

98. See United Network for Organ Sharing, *supra* note 19.

99. *Id.*

100. *Id.*

101. *Id.* See also DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM (1999) (discussing the discriminatory application of the death penalty).

102. Stephen B. Bright, *The Politics of Crime and the Death Penalty: Not “Soft on Crime,”*

Administration, approved ten death penalty prosecutions, all of which were against African-Americans, between her appointment in 1993 and 1995.¹⁰³ The discriminatory application of the death penalty, coupled with a law allowing organ procurement upon execution, would have tragic effects. African-Americans would continue to receive a disproportionate number of death sentences thereby providing organs for the rest of society. Consequently, African Americans, who are already hesitant to donate, would be less likely to donate their organs.

African-Americans are hesitant to donate because they have a negative view of the medical profession.¹⁰⁴ The Tuskegee Syphilis Study is one reason that African-Americans have a negative view of the medical community in general, and organ donation specifically.¹⁰⁵ This study began as an effort by the U.S. Public Health Service to control widespread cases of syphilis with mostly poor, uneducated, black sharecroppers in Tuskegee, Alabama.¹⁰⁶ It later became an experiment that left hundreds of black men intentionally untreated for their syphilis for nearly forty years.¹⁰⁷ The experiment continued even after penicillin was found to be a safe and effective cure.¹⁰⁸ According to Michael Taylor, "[t]he men were never told they were not receiving treatment and never given a full explanation of the meaning of syphilis and its deadly effects. And through it all, no one from the U.S. Public Health Services was held accountable."¹⁰⁹ The Tuskegee Syphilis Study continues to influence the amount of trust that African-Americans give to organ procurement organizations. Moreover, if another negative perception were added to this inherent distrust, African Americans' donation rates would be almost nonexistent.

The negative perception of organ procurement would most likely have the effect of wiping out every potential African-American donor.¹¹⁰ The Tuskegee

but Hard on the Bill of Rights, 39 ST. LOUIS L.J. 479, 480 n.6 (1995). See also *id.* at 481 (stating that of the first thirty-seven federal death penalty prosecutions, all but four were against members of a minority group).

103. *Id.* at 481 (stating that the racial disparity in federal death penalty prosecutions are even greater than in Alabama, Georgia, Mississippi, Texas, or any other state).

104. See CURRAN ET AL., *supra* note 1, at 782 (stating that most organs do not come from African-American donors).

105. See *id.*

106. Michael Taylor, *From Our Spirit: A Column for African-Americans: Righting the Wrongs of Tuskegee*, at <http://www.apla.org/apla/9705/spirit.html> (n.d.); University of Virginia Health System, *The Troubling Legacy of the Tuskegee Syphilis Study*, at <http://www.med.virginia.edu/hs-library/historical/apology/index.html> (last modified June 12, 2000).

107. Taylor, *supra* note 106.

108. *Id.*

109. *Id.*

110. "Minorities comprise 25 percent of the population and they also make up 25 percent of the donating population. 'The problem is that when you look at the waiting list, they make up about one half of the list . . .'" *Selling African Americans on Organ Donation*, at <http://www.healthatoz.com/atoz/HealthUpdate/alert02232000.html>.

Syphilis Study “continues to cast a long shadow over the relationship between African Americans and the bio-medical professions; it is argued that the Study is a significant factor in the low participation of African Americans in . . . organ donation efforts”¹¹¹ African-Americans already distrust the medical community, and a law calling for inmate organ removal would cause African-Americans to distrust the medical community even more. Consequently, African-American organ donors would not exist. African-Americans, however, are not the only group to view the bio-medical community negatively.

The stigma attached to organ donation as a result of its association with capital punishment would also result in fewer donations by Caucasian-Americans. Although the death penalty is applied with equal force among Caucasian-Americans, they too have a reason to question the motives of bio-medical professionals. “The Clinton administration revealed that hundreds of persons had been involuntarily, and in some cases unknowingly, subjected to research in which they were exposed to radiation and other harmful substances.”¹¹² Thus, the distrust of medical professionals by Caucasian-Americans, like that of African-Americans, would be even greater if executions were linked to organ procurement, and fewer of those individuals would consider donation. Caucasians’ threshold for trusting the medical community may also be raised to an unattainable standard, and organ donation would suffer a distressing blow. Executed prisoners, therefore, should not be used as cadaveric organ donors.

Organ donation and the death penalty is a very risky union:

The purpose and effect of capital punishment is to end the life of a person who has himself taken life. Trying at the same time to preserve other lives through execution by organ retrieval only confuses the situation. It is best for organ transplantation and capital punishment to go their separate ways.¹¹³

Enacting a law that permits procurement of organs from executed prisoners will cause many potential donors, whether African-American or Caucasian-American, to rethink their decisions because of an inherent lack of trust in the medical profession. Donors will question the motives of the organ procurement team, believing their lives might be shortened in order to save another human being. This proposal, moreover, would not remedy the national organ shortage. George B. Markle, IV, a New Mexico surgeon, has deemed organ donation by executed prisoners pointless. “There are simply too few condemned prisoners, and fewer still executions, for this source to make up the shortfall in organs for transplantations.”¹¹⁴

111. *A Request for Redress of the Wrongs of Tuskegee*, at <http://www.med.virginia.edu/hs-library/historical/apology/report.html> (n.d.) (featuring an abstract of the Syphilis Study Legacy Committee Final Report of May 20, 1996).

112. CURRAN ET AL., *supra* note 1, at 277.

113. Robertson, *supra* note 65.

114. Crigger, *supra* note 76, at 3.

II. ORGAN DONATION IN EXCHANGE FOR A MITIGATED SENTENCE

A. *Origin in the United States*

At least one state legislator has proposed that death row inmates should be able to donate their non-vital organs in exchange for lighter sentences. Missouri State Representative Chuck Graham introduced a bill entitled "Life for a Life" in 1998, which targeted death row inmates.¹¹⁵ This bill proposed that prisoners on death row should be permitted to donate a kidney or bone marrow in exchange for a sentence of life without parole.¹¹⁶ Graham did not seem to be concerned with the small amount of healthy, non-vital organs that could be retrieved from this high-risk group.¹¹⁷ He stated, "if [prisoners] can save [three] innocent lives through this program then they are making society better."¹¹⁸

A prisoner on Missouri's death row found this exchange tempting. In 1998, Milton V. Griffen, who was sentenced to be executed on March 25, 1998 for fatally stabbing a man in 1980,¹¹⁹ stated that he was willing to "swap a kidney or some bone marrow to save his neck" under this controversial proposal.¹²⁰ Griffen further expressed his wish to "give back to the community" by becoming an organ donor.¹²¹ Griffen was not permitted to participate in the exchange, however, because Graham's proposed bill violated federal law. The "Life for a Life" bill promoted the practice of selling organs to buy more time. Buying or selling organs is illegal in the United States,¹²² and Graham's bill, though not promoting monetary exchanges, defied legislative intent. "Although the 'letter of the law' may not be violated in this bill, clearly the spirit is violated."¹²³ Until the federal law is amended, organ donation must be altruistic. There cannot be any benefit to the donor, monetary or otherwise.¹²⁴ Even if the federal law were to allow incentives, live donation by death row inmates in exchange for life without parole would violate the prisoners' rights, as discussed in the remainder of this section.

115. See Gorman, *supra* note 28, at 76.

116. *Id.*; Lowell, *supra* note 93, at B7.

117. See discussion *supra* Part I.C.2.

118. *Newsfront*: (MSNBC cable broadcast, Mar. 21, 1998) [hereinafter *Newsfront*].

119. *Killer Offers Organ to Get Off Death Row*, L.A. TIMES, Mar. 16, 1998, at A15.

120. *Id.*

121. *Id.*

122. Jensen, *supra* note 11, at 570. Proponents of the voluntary organ donation system claim that it is unethical and immoral to profit from the sale of human organs; the existence of a market in human body parts cheapens life; the practice of selling organs is similar to selling one's self into slavery; and human organs simply fall into a category of something that cannot be sold. *Id.* at 572.

123. Lowell, *supra* note 93, at B7.

124. See *id.*

B. Problems with Procurement from Prisoners as Live Donors

Individual rights become the central issue of live organ donation. Environmental pressures to utilize living donors are increasing¹²⁵ because of the fixed number of cadaveric organs that are procured¹²⁶ and the increasing number of people placed on various waiting lists.¹²⁷ It has been argued that the "[p]rotection of the rights and health of the living person who is asked to donate an organ largely has been ignored by those who focus on the promotion of transplantation as a panacea for organ failure."¹²⁸ It follows that the health and rights of prisoners could be disregarded to an even greater extent. Consequently, balancing the harms and the benefits of live prisoner donation involves much more care than ordinary live donor situations.

Live organ donation "is apparently based on a utilitarian balance of benefit to the recipient versus harm to the donor,"¹²⁹ but when prisoners are asked to donate in exchange for mitigated sentences, the balance becomes skewed. The benefits of the exchange would seem to greatly outweigh any potential harm for three main reasons. First, the exchange implies a benefit *to the donor* much greater than the potential harm. In the United States, an organ donor cannot receive a secondary gain.¹³⁰ Second, the small amount of information given to prisoners concerning live donation would make the potential harm seem very minimal. Third, the coercive nature of the exchange would eliminate any voluntary choice. Issues of family pressure, undue influence and property interest exist in this framework, but they will not be discussed in this Note.¹³¹ The first argument against live organ donation in exchange for a mitigated sentence is the lack of informed consent.

1. Informed Consent.—Prisoners cannot exchange an organ for a mitigated sentence because their consent would not be informed. "The most common controversy involving competent, live human organ donors centers on whether the donor's consent to donate is voluntary and informed."¹³² Every competent adult has a fundamental right to refuse unwanted medical treatment.¹³³

125. See Kallich & Merz, *supra* note 77, at 143.

126. See *id.* at 142-43 (noting that the fixed number of cadaveric donors may be a result of the declining number of donors from automobile fatalities, the increased prevalence of diseases that preclude use in transplants, and the reorganization of organ procurement activities from entrepreneurial activities to federally regulated enterprises); see also *supra* Part 1.C.

127. See Kallich & Merz, *supra* note 77, at 143; see also *supra* text accompanying notes 1-15.

128. See Kallich & Merz, *supra* note 77, at 143.

129. Howard S. Schwartz, *Bioethical and Legal Considerations in Increasing the Supply of Transplantable Organs: From UAGA to "Baby Fae,"* 10 AM. J.L. & MED. 397, 427 (1985).

130. Lowell, *supra* note 93, at B7.

131. See generally Banks, *supra* note 17.

132. Banks, *supra* note 17, at 57; see also *id.* at 57 n.291 (citing *Salgo v. Leland Stanford Jr. Univ. Bd. of Trustees*, 317 P.2d 170 (Cal. Dist. Ct. App. 1957) and *Natanson v. Kline*, 350 P.2d 1093, 1106 (Kan. 1960) as starting the era of informed consent doctrine).

133. See *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 269 (1990). "[N]o right is held

Therefore, “ideas of self-preservation, self-determination, and self-fulfillment are jeopardized when consent to a medical procedure is either uninformed, involuntary, or absent.”¹³⁴ Knowledge of the risks involved is extremely important because the living organ donor has absolutely no medical need for the procedure and could be inflicted with serious health problems.¹³⁵ The knowledge prisoners receive, therefore, must be examined carefully to eliminate the possibility of misrepresentation.

Health care providers might be inclined to misrepresent risks to prisoners. The doctrine of informed consent requires that the physician and donor discuss the risks associated with the removal of the donor’s organs.¹³⁶ There are four requirements of informed consent:

Plaintiffs in informed consent claims generally will be required to prove that (1) the medical procedure carried a specific risk that was not disclosed, (2) that the reasonably prudent physician would have disclosed that risk to the patient, (3) that the undisclosed risk materialized, and (4) that the failure to disclose the information caused the patient’s injury.¹³⁷

Moreover, “[h]ealth care providers who misrepresent the risks associated with treatments could be held liable for fraud or misrepresentation.”¹³⁸ Physicians may misrepresent the risk because they believe that the convicted prisoner’s life is less important than the lives of the individuals waiting for transplants. However, the law does not allow this type of activity even if motivated to save an innocent life. Furthermore, prisoners are used for experimentation and research.¹³⁹ Organ donation is the next logical step.

Prisoners have been particularly targeted for experimentation and research purposes. “Scientists have sought to expand the knowledge of human biology, illness, and treatment, often at the expense of the least fortunate in society: slaves, the poor, criminals, and other institutionalized persons.”¹⁴⁰ Medical researchers, moreover, have a tendency to not disclose all of the potential risks

more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others. . . .” *Id.* (quoting *Union Pac. R. Co. v. Botsford*, 141 U.S. 250, 251 (1891)).

134. Banks *supra* note 17, at 57 (quoting Armand Arabian, *Informed Consent: From the Ambivalence of Arato to the Thunder of Thor*, 10 ISSUES L. & MED. 261 (1994)).

135. *See id.* at 85; Kallich & Merz, *supra* note 77, at 146 (discussing the risks of donating solid organs).

136. *See* Kallich & Merz, *supra* note 77, at 144; Anthony Szczygiel, *Beyond Informed Consent*, 21 OHIO N.U. L. REV. 171, 191 (1994) (stating that “[a] meaningful consent requires that the patient have some understanding of what she is agreeing to and how that course of treatment compares to alternative therapies and to non-treatment”).

137. CURRAN ET AL., *supra* note 1, at 227.

138. *Id.* at 228.

139. *See id.* at 201.

140. *Id.* at 276.

involved. "The reluctance of well-informed patients to participate in risky experiments might lead researchers either to conceal the experiment or to use patients from vulnerable or socially disadvantaged groups."¹⁴¹ A good example of information being concealed in an experiment involving a vulnerable group is the Tuskegee Syphilis Study.¹⁴² Prisoners, moreover, are another example of a vulnerable group used by researchers.

Prisoners have been particularly targeted for research studies because they "have long been conveniently immobile, docile, and hence ideal subjects. . . ."¹⁴³ For this same reason, they are being considered for organ donation. Many prisoners, faced with the option to donate their organs or die, are probably neither educated enough to know about their right to informed consent nor unwilling to choose the option of donation in exchange for a lighter sentence. Thus, physicians may not consider their fiduciary duties to disclose the risks as severely as their duties to other classes of living donors, especially when this vulnerable group could save innocent lives. Because a donor's consent is not informed if any crucial information is lacking or misrepresented, a physician, acting alone, cannot choose to remove non-vital organs from convicted prisoners in order to save innocent lives. A prisoner given the option of donating an organ for a mitigated sentence can neither give consent that is informed nor make a choice that is free of coercion.

2. *Coercion*.—The practice of live donation in exchange for a mitigated sentence necessarily involves coercion. Typically, live organ donation within families is welcomed.¹⁴⁴ However, most living donors are subjected to pressures from family members asking them to part with a kidney or a piece of liver.¹⁴⁵ Physicians, who verify that a family member could die without the donation, can also coerce donors in this context.¹⁴⁶ Both of these pressures can be classified as "subtle or not so subtle."¹⁴⁷ The pressure from family members can be compared to the coercion prisoners feel when forced to choose between live donation and death.

In *McFall v. Shimp*,¹⁴⁸ a Pennsylvania court refused to force a defendant to submit to an involuntary bone marrow transplant. In *McFall*, a transplant was necessary to save the life of the defendant's cousin, and the defendant was the only suitable donor.¹⁴⁹ The defendant refused to submit to the necessary

141. *Id.*

142. *See supra* discussion, Part I.C.3.

143. CURRAN ET AL., *supra* note 1, at 279.

144. *See id.* at 722.

145. *See id.* (stating that when donating occurs within the family there are concerns about coercion).

146. *See* Lawse v. Univ. of Iowa Hosps., 434 N.W.2d 895, 897 (Iowa Ct. App. 1988) (living donor was advised that his brother would die without a kidney transplant and the donor then consented to donate one of his kidneys).

147. Kallich & Merz, *supra* note 77, at 143.

148. 10 Pa. D. & C.3d 90 (Pa. C. 1978).

149. *Id.* at 92.

transplant, and his cousin filed suit.¹⁵⁰ The court did not compel the defendant to donate his bone marrow recognizing his constitutional right to refuse medical treatment and to maintain bodily integrity.¹⁵¹ The court reasoned:

For our law to *compel* defendant to submit to an intrusion of his body would change every concept and principle upon which our society is founded. To do so would defeat the sanctity of the individual, and would impose a rule which would know no limits, and one could not imagine where the line would be drawn.¹⁵²

Giving a prisoner the option to choose live donation or a death sentence compels a prisoner to submit to an intrusion of his body. A choice between death and life is not free of coercion. As the *McFall* court held, this coercion “would know no limits,” and would lead to a country that condones involuntary bodily invasions of prisoners for the benefit of an individual organ donor.¹⁵³

Live donations that do not involve family members, however, are discouraged by transplant centers.¹⁵⁴ Cases of stranger-to-stranger live donations do exist, yet they are very rare.¹⁵⁵ Unrelated transplants are beneficial because they broaden the pool of potential live donors and free up cadaveric donors for others on the waiting list.¹⁵⁶ However, medical professionals are hesitant to use the organs of unrelated donors even if it is the donor’s wish to donate for two main reasons. First, is “the decreased likelihood of a good match” when using an unrelated donor.¹⁵⁷ Second, “experience indicates that individuals who write to a transplant center in order to donate a kidney to a prospective recipient to whom they are not connected by any kind of emotional tie are frequently pathologic by psychiatric criteria.”¹⁵⁸ Additionally, there are also concerns about hidden payments when the donation is extra-familial.¹⁵⁹ Prisoner-to-stranger donations implicate even further coercion than stranger-to-stranger donations. “Legal ethicists object to inmates’ making organ donations while they’re alive to non-relatives because they believe it is impossible to obtain voluntary consent in a prison setting—especially among death row prisoners who hope their

150. *Id.* at 90.

151. *Id.* at 91.

152. *Id.* (emphasis in original).

153. *See id.*

154. *See* CURRAN ET AL., *supra* note 1, at 722.

155. *Virginian Ken Schuler Gives Liver to Stranger*, at http://www.unos.org/Newsroom/archive_story_19990820_schuler.htm (Aug. 20, 1999).

156. *Id.*

157. Schwartz, *supra* note 129, at 429. *See also* Banks, *supra* note 17, at 56 n.93 (noting that an organ transplant between genetic human twins, called an isograft, has been recognized as the most promising and successful tissue match for transplant procedures, resulting in a success rate over ninety percent).

158. Schwartz, *supra* note 129, at 429.

159. *See* CURRAN ET AL., *supra* note 1, at 722.

benevolence might win them pardons”¹⁶⁰ The prisoner’s benevolence, furthermore, will definitely win them pardons if a law allowing mitigated sentences in exchange for organs is passed.

A choice between death and donation can never be free of coercion.¹⁶¹ If prisoners are given the option to be living donors in exchange for mitigated sentences, they will be unable to make truly informed decisions or decisions that are free of coercion. “According to Sigrid Fry, the inherently coercive [prison] environment makes it ‘doubtful that prisoners can ever give truly voluntary consent’ to donate their organs”¹⁶² Moreover, when a mitigated sentence is added to this inherently coercive environment, the potential for a free decision is lessened if not destroyed. “Obviously a person condemned to death cannot consider organ or bone marrow donation as a coercion-free option. Even a death row inmate should have the option of refusing an invasive surgical procedure—although unlikely, given the alternative.”¹⁶³ The coercion implicit in Graham’s “Life for a Life” bill, “I’ll save you, if you spare me,”¹⁶⁴ is a very real and necessary obstacle in the way of passing such a law. Prisoners, like all other individuals, must have control over whether to donate their organs. Public opinion also supports the idea of bodily integrity.

3. *Public Opinion*.—Public opinion does not support a bill allowing prisoners to choose live donation in exchange for mitigated sentences. Although it has been argued that the idea of prisoners as live donors is much more popular than that of procuring prisoners’ organs after execution,¹⁶⁵ the type of live donation that involves a mitigated sentence is not. A survey administered by the *Orlando Sentinel Tribune* in 1998 revealed that twenty-six of the 617 readers questioned thought prisoners should be allowed to trade their organs for a lighter sentence and seventy-four percent thought prisoners should not be given this option.¹⁶⁶ One man interviewed about this proposal said that “this choice is unethical coherence, of course you will give up an organ instead of lethal injection.”¹⁶⁷ Another interviewee stated that “the prisons should be a place to go serve punishment and the prisoners should not be able to donate parts of their bodies.”¹⁶⁸ Some believe allowing prisoners to donate would establish “‘another vested interest in capital punishment,’ perhaps prompting judges and juries to

160. Sherman, *supra* note 58, at 11.

161. See Lowell, *supra* note 93, at B7.

162. Patton, *supra* note 13, at 417-18 (quoting Sigrid Fry, Note, *Experimentation on Prisoner’s Remains*, 24 AM. CRIM. L. REV. 165 (1986)).

163. United Network for Organ Sharing, *supra* note 19.

164. Lowell, *supra* note 93, at B7.

165. Patton, *supra* note 13, at 430 n.204. See also Robertson, *supra* note 65 (noting that Texas and other capital punishment states permit condemned prisoners to become live donors as long as the prisoners freely consent).

166. *Callers Reject Organ-Transplant Idea*, ORLANDO SENTINEL, Mar. 31, 1998, at E4.

167. *Newsfront*, *supra* note 118.

168. *All Things Considered* (NPR radio broadcast, Mar. 20, 1998).

impose the death sentence more readily.”¹⁶⁹ A proposal involving prisoners and mitigated sentences is not popular with the public. Yet, they might condone other more practical solutions to this problem.

III. POTENTIAL SOLUTIONS

A. Voluntary System

A voluntary system could be successfully implemented to solve this national crisis. “The current organ donation system in America is premised upon an ‘encouraged volunteerism’ basis, which recognizes that organ donation is legally permissible where the organ donor has freely (without coercion or undue influence) agreed to donate an organ for transplantation”¹⁷⁰ In this type of organ donation system, the donor is usually deceased. Although actual volunteerism is questionable when organs are removed from executed prisoners, the average American can voluntarily commit to this altruistic act. If more individuals were made aware of the organ shortage, educated on the availability of donor cards, and informed of the ability to tell their family of their wishes to donate, a larger pool of organ donors could be uncovered. The UNOS is leading this crusade.

The goal of the UNOS is to “[i]ncrease the public’s knowledge about the need for donors, and families will make more organs available.”¹⁷¹ In addition to the UNOS, other organizations have sought to increase education and public awareness of organ donation in furtherance of the voluntary system.¹⁷² Moreover, Jeffrey A. Lowell has argued that the representatives who have proposed the bills calling for prisoners to become donors “should lead by example: They should volunteer to be organ donors, sign the donor cards on the back of their drivers licenses, and share their wishes to be a donor with their families. Then, take the same message to their constituents.”¹⁷³ The reality, however, is that “[m]ore than [seventy-five] percent of potential organ donors do not donate.”¹⁷⁴

The voluntary system has many critics. The failure of potential donors to sign written directives; the inability of emergency and hospital personnel to locate existing donor cards; the failure of hospital personnel to approach families to request donation when the decedent does not have a donor card; the refusal of some families to give consent; and the failure of medical examiners to release bodies for organ recovery¹⁷⁵ are all major flaws of the voluntary system, and

169. Crigger, *supra* note 76, at 3.

170. Banks, *supra* note 17, at 64-65.

171. Mattson, *supra* note 9, at C1.

172. See *Organ Transplants: HHS, UNOS Announce First Substantial Increase in Organ Donations Since 1995*, Health Care Daily Rep. (BNA) (Apr. 19, 1999).

173. Lowell, *supra* note 93, at B7.

174. *Id.*

175. See MacDonald, *supra* note 13, at 180.

prove that other avenues must be considered. "Although the altruistic characteristic of voluntary donation laws is appealing, such laws have failed to reduce the organ deficit and are much less efficient than presumed consent in providing needed organs."¹⁷⁶

B. Presumed Consent

"Under [the] 'presumed consent' approach, the law would shift the presumption that people do not want to donate their organs in the absence of explicit consent to a presumption that people do want to donate their organs in the absence of an explicit refusal."¹⁷⁷ Only those individuals who do *not* want to donate are required to document their intentions in a presumed consent system.¹⁷⁸ "[P]resumed consent countries are more successful at augmenting organ supplies than countries relying on altruism."¹⁷⁹ The intent to donate in a voluntary system can be manifested by either a donor card signed by the decedent or by a family member executing the decedent's wishes.¹⁸⁰ Presumed consent for cadaveric organ donation offers advantages. For example, presumed consent does not harm individual liberty because donors are given the opportunity to opt-out. Also, the transplant is more likely to be successful because organs can be removed more quickly without contacting the donor's family. Furthermore, presumed consent leads to an increased organ supply, resulting in more tissue matches.¹⁸¹

Many states allow medical examiners to remove corneas during autopsies. In *State v. Powell*¹⁸² and *Brotherton v. Cleveland*,¹⁸³ for example, the decedents' corneas were removed without consent and used as anatomical gifts during statutorily required autopsies. These cases held that medical examiners can presume consent in these jurisdictions.¹⁸⁴ The medical examiners, however, cannot take the corneas without making a reasonable effort to ascertain a family's objection.¹⁸⁵ These state statutes have many justifiable reasons, including: removing the corneas of a decedent during an autopsy results in a minimal intrusion into the person's body; most families give consent when asked for permission; there is a small impact on the appearance of the deceased; and important health benefits are gained from corneal transplants.¹⁸⁶ A system of presumed consent to the removal of visceral organs would be the next logical

176. Jensen, *supra* note 11, at 570.

177. CURRAN ET AL., *supra* note 1, at 751.

178. MacDonald, *supra* note 13, at 181.

179. Jensen, *supra* note 11, at 565.

180. MacDonald, *supra* note 13, at 178.

181. Jensen, *supra* note 11, at 566-67.

182. 497 So. 2d 1188 (Fla. 1986).

183. 923 F.2d 477 (6th Cir. 1991).

184. CURRAN ET AL., *supra* note 1, at 749-50.

185. *Id.* at 750-51.

186. David Orentlicher, course handout in *Bioethics and the Law*, Fall 2000-2001, Indiana University School of Law—Indianapolis (on file with author).

step.

Some states have enacted statutes allowing the removal of visceral organs during autopsies.¹⁸⁷ However, these statutes have not been employed as much as those allowing the removal of corneas. "Medical examiners are reluctant to remove visceral organs for transplantation without the family's permission."¹⁸⁸ Although this system could be successful if implemented by professionals other than medical examiners during autopsies, critics support their argument with data from countries that utilize this practice.

Presumed consent has been employed in several European countries.¹⁸⁹ Austria and Belgium have found this system effective; however, the presumed consent system has not been successful in most of Europe, nor in Brazil.¹⁹⁰ Physicians, for example, usually ask the family for consent before the organs are removed for transplantation.¹⁹¹ "A system that has repeatedly failed in several countries is unlikely to succeed anywhere else. More consideration and study should be given to market driven alternatives."¹⁹²

C. Financial Inducement

"Another obvious way to increase the supply of transplantable organs is with financial inducement."¹⁹³ Financial incentives would primarily be for the families of decedents and could include such benefits as estate tax deductions, funeral expense allowances, and college education benefits.¹⁹⁴ A market system, in which human organs would be treated as a commodity, is another example of a financial inducement.¹⁹⁵ A posthumous system is the most supported financial inducement system; yet, both would increase the availability of organs.¹⁹⁶ Although federal law currently prohibits payment for organs,¹⁹⁷ some individuals are beginning to question its rationale.¹⁹⁸ Pennsylvania, for example, is one of the first states to challenge this controversial prohibition.

Pennsylvania is testing the federal law that makes it illegal to buy or sell

187. See CURRAN ET AL., *supra* note 1, at 749-50.

188. *Id.* at 751.

189. *Id.*

190. See Jensen, *supra* note 11, at 572-73.

191. See CURRAN ET AL., *supra* note 1, at 751.

192. Jensen, *supra* note 11, at 583.

193. CURRAN ET AL., *supra* note 1, at 756.

194. MacDonald, *supra* note 13, at 182.

195. *Id.*

196. *Id.*

197. Banks, *supra* note 17, at 74 (citing 42 U.S.C. § 274 (e) (1994), which provides that "it is 'unlawful for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation if the transfer affects interstate commerce.'")

198. See *supra* note 122 and accompanying text.

organs.¹⁹⁹ Pennsylvania “dropped a plan to reimburse organ-donor families up to \$300 in funeral expenses, but now [is] considering covering up to \$3,000 in ‘incidental expenses’ such as food, lodging and transportation to help promote organ donation.”²⁰⁰ It dropped the funeral expense plan to reimburse donor families fearing that the plan might violate federal law; however, Pennsylvania’s new plan is exempt from federal law because the plan only defrays incidental expenses.²⁰¹ Many individuals support Pennsylvania in its fight to end the prohibition against buying and selling organs.

Thomas Peters is one of those individuals who support financial inducements. Peters, a clinical professor of transplant surgery at the University of Florida and director of the Jacksonville, Florida transplant center said that “a financial award would be a token of acknowledgment for serving society, akin to the funds the family of deceased military personnel receive, or the money older Americans receive after paying into Social Security during their careers. New federal laws may allow for pilot projects in financial incentives.”²⁰²

Proponents of financial inducement are subjected to a vast amount of criticism. First, opponents argue that organ sales will undermine altruistic attitudes.²⁰³ Proponents contend, however, that “altruism in society is not based on what kind of organ donation system we have.”²⁰⁴ The lack of altruism is a very unsubstantial reason to prohibit a system that increases the organ supply. “Food, water, shelter, and medical care, which are all necessary for human survival, are allocated on a market system. Why then should the harvest of organs, which also provides life to those in need, be any different?”²⁰⁵ Second, “[o]pponents also worry that organ sales ‘commodify’ the body.”²⁰⁶ There is also concern that desperate individuals will take unacceptable risks for pay.²⁰⁷ Proponents counter that society already commodifies people “paying them for the fruits of their mind.”²⁰⁸ Additionally, proponents argue that this proposal may be structured such that organs are taken only after death and payment made to the decedent’s heirs.²⁰⁹ Third, opponents are concerned that wealthy individuals will be able to obtain organs more easily than poor individuals.²¹⁰ However, public assistance programs could be implemented to avoid exploitation of the poor.²¹¹ Permitting sales only to the UNOS, which, in turn, allocates the organs according

199. See Mattson, *supra* note 9, at C1.

200. *Id.*

201. *See id.*

202. *Id.*

203. See CURRAN ET AL., *supra* note 1, at 757.

204. *Id.*

205. Jensen, *supra* note 11, at 580.

206. CURRAN ET AL., *supra* note 1, at 757.

207. *See id.*

208. *Id.*

209. *Id.*

210. *See id.* at 758.

211. See Jensen, *supra* note 11, at 579.

to its usual criteria, could also eliminate this concern.²¹² Fourth, critics argue that the cost of transplantation would increase, and the quality of donated organs would decrease.²¹³ The critics, however, fail to point to any empirical evidence that the cost of transplantation will go up and seem to ignore the fact that all organs are screened for quality before transplantation. Finally, opponents can argue that incentives would alienate families that might otherwise have approved of donating their loved one's organs.²¹⁴ However, those families could donate the money to a charity.²¹⁵ "The arguments made by the critics of a market system are not strong enough to justify the failure to seriously consider a market system."²¹⁶

Financial inducement should be seriously examined. "A market system with just enough incentive to override the prevailing concerns that deter people from becoming donors may very well eradicate the organ deficit."²¹⁷ Financial inducement might be capable of succeeding where altruism has failed.

Although it is impossible to assert with certainty the exact guidelines by which such a system would best function, it is reasonable to suggest that the theories should be more vigorously debated and tested. Once implemented, the market system could be improved and fine-tuned until it operates efficiently without favoring the wealthy or encouraging violations of human rights.²¹⁸

The federal ban on the selling and buying of human organs might be a barrier in the way of saving many innocent lives, and the rationale for that law is not convincing. The various proposals attempting to further organ donation, however, have to convince their critics.

Altruism, a humane system supported by most Americans, has not been successful. Systems which include financial inducement and presumed consent deserve serious consideration. Although prisoners are not the answer to the national organ shortage, the time has come to face the imperfect nation in which we live and employ a solution that is workable, instead of likeable.

212. See CURRAN ET AL., *supra* note 1, at 758.

213. Jensen, *supra* note 11, at 579.

214. See MacDonald, *supra* note 13, at 182.

215. See Mattson, *supra* note 9, at C1.

216. Jensen, *supra* note 11, at 583.

217. *Id.* at 578.

218. *Id.* at 583.

STRENGTHENING MOTIVATIONAL ANALYSIS UNDER THE ESTABLISHMENT CLAUSE: PROPOSING A BURDEN-SHIFTING STANDARD

PAUL JEFFERSON*

INTRODUCTION

Biblically, there is a time for every purpose under heaven,¹ but courts have struggled in defining what purposes should be constitutional under the Establishment Clause.² Motivational³ analysis under the Establishment Clause is necessary to preserve the values it was adopted to protect,⁴ but the current state of purpose analysis provides no clear standard and allows the courts to invoke motivational analysis in an inconsistent manner.⁵

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1. See Ecclesiastes 3:1 (King James). “To every thing there is a season, and a time to every purpose under the heaven.” *Id.*

2. See U.S. CONST. amend. I. The First Amendment reads, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” *Id.* The first part of this amendment concerning religion is commonly referred to as the “Establishment Clause.”

3. It should be mentioned that for the purposes of this Note, the term “motivational” is synonymous with the purpose prong established in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). This standard is discussed further *infra* notes 6, 12, 13 and accompanying text. The courts do not always use the terms synonymously. In *United States v. O'Brien*, 391 U.S. 367 (1968), and other free speech cases, as well as in other cases and treatises that interpret legislation, the two terms have very different meanings. However, for the purposes of this Note, “purpose” and “motivation” both describe the underlying reason why the state action occurred. It is the reason and motive behind the action, and the way the courts have evaluated and should evaluate them. In essence, they are both terms that address the question of “why” something happened, and the Establishment Clause is concerned with whether the answer is unconstitutional.

4. See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 314 (2000) (citing *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984) (O'Connor, J., concurring)).

5. See *Freiler v. Tangipahoa Parish Bd. of Educ.*, 975 F. Supp. 819, 825 n.4 (E.D. La. 1997) (quoting *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993)), *aff'd*, 185 F.3d 337 (5th Cir. 1999). Justice Scalia, discussing the majority opinion, states:

Like some ghoulish in a late-night horror movie . . . *Lemon* stalks our Establishment Clause jurisprudence once again . . . It is there to scare us . . . when we wish it to do so, but we can command it to return to the tomb at will. When we wish to strike down a practice it forbids, we invoke it.

Id. at 398-99 (Scalia, J., concurring) (citation omitted). Justice Scalia's harsh words did not prevent

Since 1971, when the Court articulated the motivational analysis standard in *Lemon v. Kurtzman*,⁶ which made state action unconstitutional under the Establishment Clause if it does not have a secular purpose,⁷ courts have struggled in defining how much of the purpose must be secular, who has the burden of showing whether the purpose is unconstitutional, and whether the state's proffered purpose is sufficient and legitimate. Due to the large volume of cases and the myriad of facts presented, stare decisis is a poor tool of interpretation because of its inherent inflexibility and the constant presentation of new facts.⁸ Burden-shifting provides a flexible yet constant standard that alleviates this concern.

This Note proposes adopting a burden-shifting method in order to strengthen and clarify Establishment Clause motivational analysis. Under this standard, the plaintiff is required to make a prima facie case of clear religious motivation, after which the burden shifts to the defendant. The defendant will then have the burden of showing that the state action has a secular purpose that, if evaluated independently of the religious one, would be a sufficient purpose or motivation for the state action and would be narrowly tailored to meet that purpose.

Religious freedom, as protected by the Establishment Clause, is one of the cornerstones of America,⁹ and the Supreme Court's effort to uphold that freedom has become a passionate source of conversation and commentary.¹⁰ The

him from relying on *Lemon* when he joined the majority four years later in *Agostini v. Felton*, 521 U.S. 203 (1997). See *Freiler*, 975 F. Supp. at 825-26.

6. 403 U.S. 602 (1971).

7. See *id.* at 612.

8. For an interesting comparison, note the majority and dissent of *Indiana Civil Liberties Union v. O'Bannon*, 259 F.3d 766 (7th Cir.), *petition for cert. filed*, 70 U.S.L.W. 3444 (U.S. 2001). Both evaluate the secular purpose, but use different standards and achieve different results.

9. See W. SEWARD SALISBURY, *RELIGION IN AMERICAN CULTURE* 26-31 (1964). Religious freedom was an important reason for many immigrants coming to the New World. *Id.* at 26. It motivated the Pilgrims, Puritans, Quakers, Catholics, Lutherans, Anglicans, Jews, and Presbyterians. *Id.*

10. See, e.g., Leo Pfeffer, *A Case for Separation*, in JOHN COGLEY, *RELIGION IN AMERICA: ORIGINAL ESSAYS ON RELIGION IN A FREE SOCIETY* 52 (John Cogley ed., 1958). Noted jurist David Dudley Field once stated:

The greatest achievement ever made in the course of human progress is the total and final separation of church and state. If we had nothing else to boast of, we could lay claim with justice that first among the nations we of this country made it an article of organic law that the relations between man[, woman,] and [their] Maker were a private concern, into which other [people] have no right to intrude. To measure the stride thus made for the emancipation of the race, we have only to look over the centuries that have gone before us, and recall the dreadful persecutions in the name of religion that have filled the world.

Id. at 58 (quoting *American Progress*, in *JURISPRUDENCE* 6 (1893)); cf. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 294 & n.1 (2000) (describing why plaintiffs filed anonymously to protect themselves from intimidation and harassment).

Establishment Clause states that Congress shall make no law establishing a religion. That liberty, enforced upon individual states by the Fourteenth Amendment, is the sentry that stands watch over the wall of separation between church and state.¹¹ The Establishment Clause is proactive, for as well as providing a remedy for improper conduct, it requires the Court to “keep in mind ‘the myriad, subtle ways in which Establishment Clause values can be eroded.’”¹² Establishment Clause jurisprudence not only corrects improper state action, but is also proactive in its vigilance.

This notion is furthered by the purpose prong of the most widely used test for Establishment Clause jurisprudence, the three-part test articulated in *Lemon v. Kurtzman*. Under *Lemon*, a statute is unconstitutional if it does not have a secular purpose, if it has the effect of advancing or inhibiting religion, or if it causes excessive entanglement between the church and the state.¹³ State action need only violate one of these three prongs to be held invalid.

The purpose prong of *Lemon* is unique because a state action need not have an impermissible effect if its underlying rationale is unconstitutional. This analysis presents the courts with a difficult, but proactive method to evaluate a state action’s constitutionality. The purpose of this Note is to articulate how the evaluation of the purpose of state action can be done more effectively, taking advantage of the Supreme Court’s recognition that the values of the Establishment Clause are important and need to be upheld independently of the effect.¹⁴ This Note advocates a method by which these values can be upheld while also allowing the state an opportunity to act if the secular purpose behind the state action is legitimate and the action is narrowly tailored to uphold a valid and valuable secular state interest.

By using a burden-shifting standard instead of the current standard, where any secular purpose is allowed, the courts will be able to strengthen motivational analysis of the Establishment Clause and preserve Establishment Clause values. Making the standard more difficult for the defendant to overcome, clarifying the standard to more clearly guide state action and define individual rights, helping to eliminate the perception that the purpose test is used as a fall back provision when the courts want to have a reason to invalidate state action, and not overturning otherwise valid state action because the legislative record reveals improper motivation, will allow the Establishment Clause to continue to be one of the greatest achievements of our Constitution.¹⁵ A burden-shifting analysis

11. See *infra* note 43 and accompanying text. Thomas Jefferson first proffered this notion of separation in his letter to the Danbury Baptist Congregation. It has subsequently become one of the more popular phrases to describe church state relationships in this country.

12. *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 314 (citing *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984) (O’Connor, J., concurring)).

13. See 403 U.S. 602, 612-13 (1971).

14. Cf. *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 314. “Our Establishment Clause cases involving facial challenges, however, have not focused solely on the possible applications of the statute, but rather have considered whether the statute has an unconstitutional purpose.” *Id.*

15. See *supra* note 10.

will also serve the needs of those who believe that the Establishment Clause is being interpreted in a manner detrimental to religious freedom.¹⁶

This Note is intended to be a start, not an end, to the discussion of how the purpose behind a state's action should be used to uphold our right to religious freedom under the Establishment Clause, while allowing the state sufficient opportunity to prove the constitutional and secular merits of its actions. This Note begins this discussion in Part I by developing a common foundation upon which to build the discussion. Part II discusses the role of motivational analysis in Establishment Clause jurisprudence. Part III makes a case for changing the current standard. Finally, Part IV discusses how a burden-shifting standard would be applied.

I. FINDING A COMMON DEFINITIONAL STANDARD FOR ESTABLISHMENT CLAUSE DISCUSSION

A. *The Establishment Clause*

1. *A Brief History of the Establishment Clause.*—Before the American Revolution, most states had an established religion.¹⁷ These established religions discriminated against Jews, Roman Catholics, and other Protestant denominations.¹⁸ For example, Virginia established the Church of England as its state religion and made it illegal to “[p]reach[] in unlicensed houses [or] . . . without Episcopal ordination. . . .”¹⁹ This persecution inflamed James Madison,²⁰ whose anger may have caused him to include among his proposals for amendments to the Constitution, a proposal that read, “The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.”²¹ This proposal is reflected in the First Amendment to the Constitution.²²

The religion clauses of the Constitution have created special problems when looking to history as a guide to their interpretation.²³ This is exacerbated because

16. See, e.g., William F. Cox, Jr., *The Original Meaning of the Establishment Clause and Its Application to Education*, 13 REGENT U. L. REV. 111, 111 (2000) (stating that the Supreme Court “has wrongly interpreted the [First] Amendment”).

17. LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE* 1 (1994).

18. *Id.*

19. *Id.* at 1, 3.

20. *Id.* at 3-4 (quoting 1 *THE PAPERS OF JAMES MADISON* 106 (William T. Hutchinson et al. eds., 1962)). In 1774, Madison wrote, “That diabolical Hell conceived principle of persecution rages among some and to their eternal Infamy the Clergy can furnish their Quota of Imps for such business. This vexes me the most of any thing whatever.” *Id.*

21. *Id.* at 94-95 (quoting 1 *THE DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES* 448-59 (Joseph Gales & W.W. Seaton eds., 1834)).

22. See U.S. CONST. amend. I.

23. See ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 969 (1997).

there is no concrete notion of the Framers' intent.²⁴ Yet history is still often invoked in Establishment Clause opinions in support of various positions.²⁵ Additionally, the problem is compounded by enormous changes in our society since the Constitution was ratified.²⁶

Clearly, the Establishment Clause is a limitation on national government, but it has been found to limit state government due to incorporation by the Fourteenth Amendment.²⁷ Therefore, though the literal text of the Establishment Clause only limits actions by Congress, it has been interpreted to apply to actions by all the branches of government at both the state and federal levels.

2. *The Use of History as Support in Establishment Clause Opinions.*—Compounding the problem of historical interpretation of the Establishment Clause is that there is more religious diversity today,²⁸ and public schools—a large source for Establishment Clause jurisprudence—did not exist when the Bill of Rights was ratified.²⁹ Additionally, by merely being observant of this nation's traditions and habits, individuals or citizens are made aware of this country's religious heritage, for money is engraved "In God We Trust," and elected officials begin their terms in office by swearing on a Bible.³⁰ But while this history should be celebrated, it should not dictate a path toward infringing on one of the nation's most sacred traditions: religious liberty.

Using a burden-shifting approach would help to alleviate some of the problems history has played in Establishment Clause jurisprudence. As stated previously, history is currently invoked as a source for both sides of the Establishment Clause argument. If a burden-shifting model were used, then the question would not be one of interpretation of the Framers' intent regarding the Establishment Clause, but whether there was a legitimate secular purpose that would enable the law to pass judicial scrutiny. Granted, this assumes a fundamental belief that a law without a legitimate and overriding secular purpose

24. Beyond the purely logistical question, namely who exactly were the Framers, courts have struggled because the debate raged even then, providing ample fodder for both sides. *See id.* (quoting *Sch. Dist. v. Schempp*, 374 U.S. 203, 237 (1963) (Brennan, J., concurring)). Justice Brennan stated: "A too literal quest for the advice of the Founding Fathers upon the issues of these cases seems to me futile and misdirected . . . [as] the historical record is at best ambiguous, and statements can readily be found to support either side. . . ." *Schempp*, 374 U.S. at 237 (Brennan, J., concurring).

25. *See, e.g.,* *Wallace v. Jaffree*, 472 U.S. 38, 113 (1985) (Rehnquist, J., dissenting). Justice Rehnquist stated, "The true meaning of the Establishment Clause can only be seen in its history." *Id.*

26. *See* CHEMERINSKY, *supra* note 23, at 970.

27. LEVY, *supra* note 17, at 224-26 (arguing that to not have the Establishment Clause incorporated would "turn back the clock" and "is so unrealistic as not to warrant consideration").

28. CHEMERINSKY, *supra* note 23, at 970.

29. *See id.*

30. For a good discussion of relevant cases, see *Books v. City of Elkhart*, 235 F.3d 292, 322-25 (7th Cir. 2000) (Manion, J., concurring in part and dissenting in part), *mandate stayed by* 239 F.3d 826 (7th Cir.), *and cert. denied*, 121 S. Ct. 2209 (2001).

is invalid, but this argument also takes the historical interpretation, which cannot be clearly ascertained on either side, partially (if not wholly) out of the equation and allows for a clearer, more easily applicable standard.

3. *Justifications for an Establishment Clause.*—In order to evaluate a purpose behind a state's action under the umbrella of the Establishment Clause, one must understand both the rationale that underlies the adoption of the Establishment Clause and the purpose the Establishment Clause serves today. It should be noted that the Establishment Clause developed from a group of colonies, the majority of which had state-sponsored religion.³¹ Perhaps its development can be directly related to the fact that England had a clearly state-sponsored religion.³² It is also possible that as a stronger federal government was created, the Framers wished to secure liberties that this stronger government would not be able to take away.³³ However, it seems clear that the Framers did not see the full range of repercussions of this amendment,³⁴ and it is unclear whether the Framers would have approved or disapproved of this reach.³⁵

The Establishment Clause flares passions in many people.³⁶ Some people view it as a tool being utilized by people who dislike organized religion to stamp out the very roots that strengthen this country, both historically and morally.³⁷ Others view it as a last firewall of protection against fundamentalist religious groups who would otherwise force their agendas upon all citizens.³⁸ Regardless, this preservation of liberty is uniquely American and deserves close scrutiny of not only the actual effect that the state action does have, but also of the potential effects that government action could have on this liberty. By using a standard that values the purpose behind the state action, we safeguard our liberty before it has been infringed.

4. *The Tension Between the Establishment Clause and the Free Exercise Clause.*—It is important to note the tension between the Establishment Clause and the Free Exercise Clause, also found in the First Amendment.³⁹ There is a natural antagonism that exists between the two clauses, for one prohibits the state

31. See LEVY, *supra* note 17, at 1.

32. See *id.* It is even called "the Church of England."

33. See *id.* at 84.

34. See, e.g., Cox, *supra* note 16, at 128-29. Many of the events the Framers took for granted, such as the congressional chaplain system, invocations, religious holidays, displays, etc., would later be challenged under Establishment Clause jurisprudence.

35. See *supra* Part I.A.2 (discussing the role of history in Establishment Clause opinions).

36. See, e.g., Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 294 & n.1 (2000) (describing why plaintiffs filed anonymously to protect themselves from intimidation and harassment).

37. ROBERT L. CORD, SEPARATION OF CHURCH AND STATE, at xiv (1982) (stating that the "Supreme Court has erred in its interpretation of the First Amendment").

38. See LEVY, *supra* note 17, at 188-95 (discussing, as an example, the "antiscientific" theory of creationism and the manner by which the Establishment Clause prevents it from being taught in public schools).

39. See U.S. CONST. amend. I ("Congress shall make no law . . . prohibiting the free exercise [of religion].").

from establishing a religion, while the other prevents a state from inhibiting its practice.⁴⁰ Each clause serves as a sort of check and balance on the other. The issue then arises whether strengthening the Establishment Clause, as a burden-shifting motivational standard would do, would tip the scales too far in one direction.

Strengthening motivational analysis by using a burden-shifting standard would help, not hinder, the free exercise of religion because it would ensure that the foundation of that right, to practice the religion one chooses, is not being eroded. By prohibiting state interference with an individual freedom, more space exists for that freedom to manifest itself. Additionally, it would seem that one would be in favor of state-sponsored religion only if the state is establishing *his or her* religion. By preserving the antimajoritarian values of both the Constitution and religious freedom, as a burden-shifting standard would do, religious freedom is preserved for all.

B. Perspectives on the Establishment Clause: Separationist, Nonpreferential, and Neutral Treatment of the Establishment Clause

There are three conflicting ways to interpret the Establishment Clause: the separationist, nonpreferential, and neutrality approaches.⁴¹ The first and broader approach, that of the separationist,⁴² finds its genesis in a letter from Thomas Jefferson to the Baptist Association of Danbury, Connecticut, in which Jefferson describes a “wall of separation between church and state.”⁴³ This doctrine has as its foundation that government may not aid religion, even if the aid is impartial, equitably administered, and given to all religious groups.⁴⁴ The separationist approach was made the predominant standard in *Everson v. Board of Education*,⁴⁵ when the majority and dissent—though arriving at different conclusions as to whether the wall had been breached—agreed that the standard was separation of church and state.⁴⁶

The second and narrower approach “is that of nonpreferentialism or accommodation of religion.”⁴⁷ This interpretation holds that the First Amendment prohibits the government from establishing a state church that would

40. See JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 1307 (6th ed. 2000).

41. See generally LEVY, *supra* note 17, at 149-52.

42. For a more detailed discussion of the separationist approach, see *id.* at 149-51; see also CORD, *supra* note 37.

43. LEVY, *supra* note 17, at 246. The pertinent portion of the letter reads, “I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should ‘make no law respecting an establishment of religion, or prohibiting the free exercise thereof,’ thus building a wall of separation between church and state.” *Id.* (quoting 16 THE WRITINGS OF THOMAS JEFFERSON 25 (Andrew A. Lipscomb & Albert E. Bergh eds., 1903-04)).

44. See *id.* at 150.

45. 330 U.S. 1 (1947).

46. See MICHAEL S. ARIENS & ROBERT A. DESTRO, RELIGIOUS LIBERTY IN A PLURALISTIC SOCIETY 275 (1996).

47. LEVY, *supra* note 17, at 151.

be preferred over other churches.⁴⁸ While many of the current Supreme Court Justices prefer this approach,⁴⁹ it is a “fundamentally defective interpretation of the [E]stablishment [C]lause.”⁵⁰ The fundamental flaw lies in the fact that the First Amendment “was framed to deny power,” not create it.⁵¹ Nonpreferential interpretation results in the government’s ability to aid religion as long as it does so without discriminating, a vesting of power that the First Amendment did not prescribe.⁵²

A third position is the neutrality approach, where the Establishment Clause, as well as the other religion clauses, are interpreted to mean that government may neither establish a benefit nor impose a burden upon religion.⁵³ This is the theory behind the endorsement test as articulated by Justice O’Connor.⁵⁴ But this theory evokes the same problems, such as indirect aid to religion and the creation of power, that arise when determining how to interpret whether a law is preferential.⁵⁵ Additionally, the endorsement test has traditionally been used to evaluate only the effect of the state action, not the purposes behind it, and has often been coupled with the purpose prong of the *Lemon* test.⁵⁶

A full discussion of these approaches is outside the scope of this Note, but it is important to know that this Note assumes, along with the prevailing and dominant wisdom of the courts, that the separationist approach is the proper approach to follow.⁵⁷ This is important because the nonpreferentialist approach

48. *Id.*

49. *See id.* (mentioning Chief Justice Rehnquist and Justices Kennedy, Scalia, and Thomas).

50. *Id.* at 112.

51. *Id.* at 115.

52. *See id.* For further discussion on the nonpreferential versus separationist approach, see generally *id.* at 112-45.

53. *See* CHEMERINSKY, *supra* note 23, at 977-78.

54. *See* *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984) (O’Connor, J., concurring) (stating that “[E]very government practice must be judged . . . to determine whether it constitutes an endorsement or disapproval of religion.”).

55. *See* CHEMERINSKY, *supra* note 23, at 979.

56. *See* *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 314 (2000) (stating that the Court assesses the constitutionality of state action “by reference to the three factors first articulated in *Lemon v. Kurtzman*” (citation omitted)); *see also* *Freiler v. Tangipahoa Parish Bd. of Educ.*, 185 F.3d 337, 344 (5th Cir. 1999) (stating the *Lemon* test is “occasionally ignored”); *Books v. City of Elkhart*, 79 F. Supp. 2d 979, 998 (N.D. Ind. 1999) (stating the endorsement test “is a refinement of the *Lemon* test”), *rev’d*, 235 F.3d 292 (7th Cir. 2000), *mandate stayed by* 239 F.3d 826 (7th Cir.), and *cert. denied*, 121 S. Ct. 2209 (2001).

57. *See* *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 314 (using the *Lemon* test, a test commonly associated with the separationist approach). This separation should not be so strict that it overshadows freedom, for something religious in nature need not have an illegitimate religious purpose. *See* ARLIN M. ADAMS & CHARLES J. EMMERICH, *A NATION DEDICATED TO RELIGIOUS LIBERTY* 37 (1990). The separation concept serves the need of a greater goal than just separation: to achieve the ideal of religious liberty in a free society. *See id.* But *see* CORD, *supra* note 37, at xiv (stating that the “Supreme Court has erred in its interpretation of the First Amendment” and

makes the purpose behind the law irrelevant: it is only concerned with whether the law has the effect of preferring one religion over another.⁵⁸ The neutrality approach, as strictly construed, also makes the purpose irrelevant, because it deals only with the question of whether a law establishes a benefit or burden, a question that deals with effect, not purpose.⁵⁹ While one could argue that the purpose behind the law would still be relevant to this particular analysis, that argument is beyond the scope of this Note. Also, as discussed *infra*, the neutrality approach is frequently coupled with motivational analysis.

C. The Endorsement and Coercion Standards

It is important to note that while the *Lemon* test has been reaffirmed as the dominant Establishment Clause standard, the Court has also articulated other standards since the adoption of *Lemon*.⁶⁰ In *Lynch v. Donnelly*,⁶¹ Justice O'Connor, in a concurring opinion, articulated what has become known as the "endorsement test."⁶² She stated that endorsement was the proper standard because "more direct infringement is government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."⁶³ The endorsement test has not overruled the *Lemon* test, but has instead evolved into a component of the *Lemon* standard, often measured in one of the prongs of *Lemon*.⁶⁴ Nonetheless, clearly the endorsement standard is important in modern Establishment Clause analysis.⁶⁵

Another alternative standard, known as the "coercion" test, was proffered by the first Bush administration as amicus curiae in *Lee v. Weisman*,⁶⁶ and urged that the plaintiff would have to show government coercion to establish unconstitutionality.⁶⁷ *Lee*, involving prayers at high school commencements, held that such prayers were in violation of the Establishment Clause in part

criticizing the current separationist approach).

58. See LEVY, *supra* note 17, at 151.

59. See CHEMERINSKY, *supra* note 23, at 979.

60. *Books*, 79 F. Supp. 2d at 989-1006 (giving an overview of the historical precedent test, the *Lemon* test, the endorsement test, the coercion test, and the test for religious speech in a public forum).

61. 465 U.S. 668 (1984).

62. See *id.* at 689 (O'Connor, J., concurring).

63. *Id.* at 688.

64. See *Books*, 79 F. Supp. 2d at 998 (stating the endorsement test "is a refinement of the *Lemon* test"). There has been much discussion that the endorsement test has supplanted *Lemon*. However, the most recent Supreme Court decision concerned itself with purpose, an area traditionally found in the *Lemon* test, but not in the endorsement standard. *Sante Fe Sch. Dist. v. Doe*, 530 U.S. 290 (2000).

65. See *Books*, 79 F. Supp. 2d at 998.

66. 505 U.S. 577 (1992).

67. LEVY, *supra* note 17, at 200-01.

because the school principal “directed and controlled the content of the prayers.”⁶⁸ Justice Kennedy, the author of the opinion, emphasized the coercive nature of the activities in ruling them unconstitutional.⁶⁹

Regardless of the exact resting place of these standards in Establishment Clause analysis, the purpose behind the state’s action will be relevant. It is important to divorce purpose from effect, because, in Establishment Clause analysis, courts are dealing with the establishment of religion, not the effect of religion; courts are determining if the values of the Establishment Clause are being eroded, not solely if the effect of that erosion exists. One need not have a liberty usurped to know it is being threatened. Therefore, this clause of the Constitution is uniquely preventative and proactive in guarding our liberties.

The burden-shifting model works in evaluating motivational analysis under either the *Lemon* or the endorsement approach to the analysis of the purpose of state action. These approaches dominate the current state of Establishment Clause jurisprudence and have represented the prevailing standard for decades as they were used even before the articulation in *Lemon*.⁷⁰ Burden-shifting works in the *Lemon* approach because separation is the rationale behind the *Lemon* test. Burden-shifting works under the endorsement model because the Court has substituted the endorsement standard only for the second and third prongs of *Lemon*, leaving the first prong intact.⁷¹

II. THE ROLE OF MOTIVATIONAL ANALYSIS IN ESTABLISHMENT CLAUSE JURISPRUDENCE

The Court’s motivational analysis under the Establishment Clause, by attempting to discover the purpose behind a state’s action, is unique because an illegitimate purpose alone can cause state action to be held unconstitutional regardless of its effect.⁷² In early Establishment Clause cases, such as *Everson v. Board of Education*,⁷³ the Court evaluated larger doctrinal questions such as separation of church and state.⁷⁴ When the Court first began evaluating the purpose behind state action, the Court clearly, but not explicitly, looked to the

68. *Lee*, 505 U.S. at 588.

69. LEVY, *supra* note 17, at 202.

70. *See, e.g., Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (using the *Lemon* test and decided twenty-nine years after the *Lemon* decision).

71. *See Agostini v. Felton*, 521 U.S. 203, 232-33 (1997) (stating that *Lemon*’s entanglement test only deals with a statute’s effect); *see also Books v. City of Elkhart*, 79 F. Supp. 2d 979, 998 (N.D. Ind. 1999) (stating the endorsement test “is a refinement of the *Lemon* test”), *rev’d*, 235 F.3d 292 (7th Cir. 2000), *mandate stayed* by 239 F.3d 826 (7th Cir.), and *cert. denied*, 121 S. Ct. 2209 (2001).

72. Hal Culbertson, *Religion in the Political Process: A Critique of Lemon’s Purpose Test*, 1990 U. ILL. L. REV. 915, 917.

73. 330 U.S. 1 (1947).

74. Culbertson, *supra* note 72, at 926.

purposes behind the statutes.⁷⁵ However, the analysis of the purpose was not independent and included not only the legislative purpose, but also “general public rhetoric.”⁷⁶

Evaluation of a statute’s purpose in determining whether state action violates the Establishment Clause was cemented in *Lemon v. Kurtzman*,⁷⁷ when the Court established the *Lemon* test.⁷⁸ The *Lemon* test is a three-prong test, in which a violation of any prong causes state action to be unconstitutional.⁷⁹ In order for a law to be constitutional, it must have a legitimate secular purpose, its primary effect cannot advance or inhibit religion, and government and religion must not be excessively entangled.⁸⁰

A. Past Application of Motivational Analysis

The Court first inquired into the purpose of state action with regard to Establishment Clause jurisprudence in *McGowan v. Maryland*,⁸¹ a case involving Sunday “blue laws.” In *McGowan*, the Court determined that although these laws had been passed to promote religion, the purpose had evolved into a secular one, providing for “a uniform day of rest”; therefore, the laws were upheld.⁸² In *McGowan*, the Court did not consider the purpose behind the statute independently from its effect,⁸³ but nonetheless clearly delved into the laws.

In *School District v. Schempp*,⁸⁴ decided two years later, the court considered a situation in which the Bible was read, without comment, but with a recitation of the Lord’s Prayer, in schools. Again, the Court did not consider the purpose independently from the effect, but it clearly accorded a high value to the purpose of the school board as it struck the policy down.⁸⁵ The purpose test in *Schempp* was solely used in *Epperson v. Arkansas*,⁸⁶ where the Court declared invalid a statute that prohibited the teaching of evolution in public schools.⁸⁷ In declaring the statute invalid, the Court looked at public rhetoric and the history of the statute.⁸⁸

The purpose prong was solidified in its current basic form in *Lemon v.*

75. *Id.* at 927. These cases included *McGowan v. Maryland*, 366 U.S. 420 (1961), and *Epperson v. Arkansas*, 393 U.S. 97 (1968). Culbertson, *supra* note 72, at 927-28.

76. Culbertson, *supra* note 72, at 927.

77. 403 U.S. 602 (1971).

78. Culbertson, *supra* note 72, at 930.

79. *Id.*

80. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

81. 366 U.S. 420 (1961).

82. *Id.* at 444-46, 451.

83. See Culbertson, *supra* note 72, at 928.

84. 374 U.S. 203 (1963).

85. See *id.* at 222-24.

86. 393 U.S. 97 (1968).

87. *Id.* at 107, 109.

88. See *id.* at 108 & n.16, 109. The statute was passed shortly after the Tennessee *Scopes* decision. *Id.* at 98.

Kurtzman.⁸⁹ At issue in *Lemon* were Pennsylvania and Rhode Island statutes that compensated private school teachers for nonreligious activities.⁹⁰ The Court invalidated both of these aid provisions, but accepted the legislatures' proposed secular purpose of promoting the education of young children.⁹¹ In *Stone v. Graham*,⁹² decided nine years later, the Court invalidated a statute in Kentucky requiring the posting of the Ten Commandments in the classroom on the grounds that the statute could have no secular purpose,⁹³ further securing motivational analysis.

The purpose prong of *Lemon* laid dormant in the Court for several years, but reemerged in *Wallace v. Jaffree*,⁹⁴ where the Court used it to examine a statute authorizing a moment of silence.⁹⁵ The Court determined the purpose was religious by looking at commentary by the legislative sponsor and by comparing the original and amended statute.⁹⁶ In 1987, the Court invalidated a statute dealing with the teaching of evolution because the stated secular purpose was "a sham."⁹⁷ As evidence that the statute was a sham, the Court looked at legislative hearings,⁹⁸ statements made by the sponsor,⁹⁹ and expert statements describing creation science as religious.¹⁰⁰

As Supreme Court jurisprudence evolved and *Lemon's* purpose prong became the prevailing motivational standard, the Court used pure motivational analysis in its decisions. Pure motivation analysis requires the court to evaluate the purpose of an action independently from the effect of the action.¹⁰¹ This is pure motivational analysis because the purpose test alone is sufficient to make an act unconstitutional;¹⁰² that is, if the purpose is violative the court does not even need to discuss the effect of the statute,¹⁰³ but instead the court can evaluate facts solely on the basis of their motivation.¹⁰⁴

89. 403 U.S. 602 (1971).

90. *See id.* at 606-10.

91. *Id.* at 607, 613.

92. 449 U.S. 39 (1980) (per curiam).

93. *Id.* at 39-41.

94. 472 U.S. 38 (1985).

95. *Id.* at 40, 55-56.

96. *Id.* at 56-58.

97. *Edwards v. Aguillard*, 482 U.S. 578, 586-87 (1987).

98. *Id.* at 587.

99. *Id.* at 592.

100. *Id.* at 591.

101. *See Culbertson*, *supra* note 72, at 920.

102. *Id.*

103. *Id.* at 920; *see also Sante Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 250 (2000) (holding a prayer before football games unconstitutional in large part because the state had no legitimate secular purpose); *Edwards*, 482 U.S. at 585 (excluding discussion of the entanglement tests); *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985) (stating that the relevant statute lacked a secular purpose).

104. *See Culbertson*, *supra* note 72, at 919-20.

One problem that has plagued the courts has been defining the standard for an actual secular purpose.¹⁰⁵ In *Lemon*, the Court stated that the law must have some secular purpose.¹⁰⁶ However, the Court has sacrificed clarity by stating at different times that “a secular purpose” is sufficient,¹⁰⁷ that the law must be *clearly* secular to be valid,¹⁰⁸ and that it would be invalid if its *primary purpose* was a religious one.¹⁰⁹

B. Policy Justifications for Establishment Clause Motivational Analysis

A rationale for the purpose test of *Lemon* is that the essence of the Establishment Clause is to prevent government from advancing religion.¹¹⁰ If one can stop the unconstitutional effect from occurring, then an injury under the Establishment Clause is avoided. The Establishment Clause is unique in that an unconstitutional injury can be avoided before the effect has occurred.¹¹¹ This is true because the values supporting the Establishment Clause can be upheld when the values themselves are infringed, as opposed to after religious liberty is abridged.

Additionally, a purpose of the Establishment Clause is to remove the debate over the “preservation and transmission of religious beliefs” from government supervision or control.¹¹² The purpose test represents a “check on religious influences in the political process.”¹¹³ The government should not decide what is appropriate religious doctrine to be imparted to society, for that privilege is bestowed on the people by the Free Exercise Clause.¹¹⁴ By allowing a state action to be unconstitutional before its unconstitutional effect has occurred, the debate—which itself can be injurious to those who fervently argue their sides¹¹⁵—is removed from the legislative branch of government and is done so, potentially, before the injurious effect has occurred.

105. See generally Daniel O. Conkle, *Religious Purpose, Inerrancy, and the Establishment Clause*, 67 IND. L.J. 1, 3-7 (1991).

106. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

107. *Lynch v. Donnelly*, 465 U.S. 668, 681 & n.6 (1984).

108. *Harris v. McRae*, 448 U.S. 297, 319-20 (1980).

109. *Edwards v. Aguillard*, 482 U.S. 578, 593 (1987).

110. *CHEMERINSKY*, *supra* note 23, at 988.

111. See *infra* Part IV.E; see also *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 313-14 (2000) (discussing how Establishment Clause values must be protected).

112. *Santa Fe Ind. School Dist.*, 530 U.S. at 310 (quoting *Lee v. Weisman*, 505 U.S. 577, 589 (1992)).

113. *Culbertson*, *supra* note 72, at 926.

114. See, e.g., Misti Weeks, *Establishment Clause Meets Free Exercise Clause in Friday Night Football: With Supreme Court Misguidance, Fifth Circuit Drops the First Amendment Ball on the 1-Yard Line*, 31 TEX. TECH L. REV. 1083, 1094 (2000); see also U.S. CONST. amend. I.

115. See *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 315 (stating “one of the purposes served the Establishment Clause is to remove debate over this issue from government supervision . . .”).

C. Modern Trend in Motivational Analysis

In June 2000, the Court handed down the most recent decision invalidating a statute because of its purpose in *Santa Fe Independent School District v. Doe*.¹¹⁶ Stating that the Constitution required the Court to be mindful of the myriad and subtle ways that Establishment Clause values could be eroded,¹¹⁷ including erosion by a policy that has the purpose of government establishment of religion,¹¹⁸ the Court held a school district policy of allowing students to hold elections to determine if invocations should occur before football games, and then to determine who should deliver them, unconstitutional.¹¹⁹ The policy was held invalid in part because it “unquestionably has the purpose and creates the perception of encouraging the delivery of prayer at . . . school events.”¹²⁰

The policy at issue was a facially neutral one authorizing two student elections—the first to determine whether invocations should be held before football games, and the second to determine the spokesperson.¹²¹ The policy also automatically limited the invocation to one that would be “nonsectarian and nonproselytising,” but only if the original policy was enjoined.¹²² The final draft of the policy omitted the word “prayer” and referred to “messages,” “statements,” and “invocations,”¹²³ and the school district argued that the policy was constitutional because it was content-neutral.¹²⁴

In declaring the policy invalid, the Court looked at the language of the policy that stated that the purpose and requirements were “to solemnize the event,” “promote good citizenship,” and “establish the appropriate environment for competition.”¹²⁵ After review of this language, the Court determined the purpose of the policy was “the selection of a religious message, and that is precisely how the students understand the policy.”¹²⁶ The Court then determined that the purpose of the policy was clearly religious.¹²⁷ In making its determination, the Court looked at the text of the policy,¹²⁸ a long established tradition of prayer at

116. *Id.* at 317.

117. *Id.* at 314 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984)).

118. *Id.*

119. *Id.* at 297-98, 317.

120. *Id.* at 317.

121. *Id.* at 297-98.

122. *Id.* at 297.

123. *Id.* at 298.

124. *Id.* at 315.

125. *Id.* at 306. The Court noted that these are permissible types of messages, and that a solemn, nonreligious message on United States foreign policy would not be allowed by the school policy. *Id.*

126. *Id.* at 307.

127. *Id.* at 309. The Court stated, “The District . . . asks us to pretend that we do not recognize what every Santa Fe High School student understands clearly—that this policy is about prayer.” *Id.* at 315.

128. *Id.* at 314-15. The Court looked at the “plain language,” “the preferred message” of the

football games,¹²⁹ and the fact that the policy imposed a “majoritarian election on the issue of prayer.”¹³⁰ The Court also looked at the “history and context of the community and forum.”¹³¹

Santa Fe illustrates several problems with the current purpose-prong analysis that a burden-shifting model would help cure. First of all, while tradition may be an indicator of the purpose behind the policy, it creates some problems for both sides of the argument. For the plaintiff, tradition only works if there is past violative history. Therefore, if the school in *Santa Fe* had never before held an invocation before football games, the policy would have had a better chance of being held constitutional, because tradition was clearly integral to the Court’s decision. For the defendants, if their current purpose was to correct past Establishment Clause violations, they are prevented by their past history from doing so because that same tradition would invalidate current action. As we have seen with Christmas and some public displays during that season, what starts off as a wholly religious holiday can have great and legitimate secular meaning.¹³² With a burden-shifting approach, history would still be available to the plaintiffs to show a pattern of behavior or possible motivation. However, it would not make a purpose invalid per se, because the defendant would have the ability to stay within constitutional limits if it could show that the secular purpose was sufficient to uphold the government action.

Another problem in the current purpose analysis under the Establishment Clause is illustrated in *Freiler v. Tangipahoa Parish Board of Education*.¹³³ Here, the Fifth Circuit Court of Appeals disagreed with the district court’s finding that no secular purpose existed for a school board policy creating a disclaimer to be used whenever evolution was taught.¹³⁴ While holding that the school board had still violated the Establishment Clause because it endorsed religion, the court noted that the only thing necessary to pass the purpose prong was “a sincere secular purpose[,] . . . even if that secular purpose is but one in a sea of religious purposes.”¹³⁵ The court then treated the school board’s proffered secular purposes with deference, while trying to determine if they were a sham

“invocation,” and “the selective access of the policy,” which made it a “limited public forum for the expression of free speech.” *Id.*

129. *Id.* at 315.

130. *Id.* at 316.

131. *Id.* at 317 (citation omitted).

132. *See County of Allegheny v. ACLU*, 492 U.S. 573, 617-18 (1989) (stating that Christmas and Chanukah displays had secular as well as religious meaning).

133. 185 F.3d 337 (5th Cir. 1999).

134. *Id.* at 341-42, 345. The district court ruled that no secular purpose existed because the school board’s assertion that the disclaimer would encourage critical thinking was a sham. That court came to this conclusion because the state’s proffered purpose was not mentioned in the debates concerning the policy’s adoption, and because the school board already encouraged critical thinking. *Id.* at 342.

135. *Id.* at 344, 348 (citing *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985)).

by determining if the purpose was furthered by the state action.¹³⁶ The court then held that two of the three proffered purposes were not a sham¹³⁷ and therefore that the statute survived scrutiny under motivational analysis.

By evaluating a secular purpose in this manner, it is possible to have a legitimate secular purpose that is motivating the action, but this purpose may be secondary to the religious purposes behind the action. Currently, this would still be constitutional. Having a burden-shifting model helps correct this inequity by not allowing the action to pass scrutiny unless the secular purpose is sufficiently important to stand independent of the religious purpose(s) behind the state action and is narrowly tailored to serve the state's secular interest. In other words, by advancing a proposal that requires a clearly religious purpose to shift the burden to the defendant to show that the secular purpose, if evaluated independently of the religious purpose(s), is sufficient to justify state action, the burden-shifting model helps cure this issue.¹³⁸

When one uses the purpose of state action to hold the action unconstitutional, the obvious difficulty is determining the purpose. This is compounded in Establishment Clause jurisprudence because the effect of the state's action is not considered when evaluating the purpose behind it.¹³⁹ Interpretation of the purpose behind the state action often involves an inquiry similar in some respects to that of statutory interpretation.¹⁴⁰ Courts use things such as "committee reports, floor debates, legislative hearings," and the circumstances behind a bill's passage.¹⁴¹ Courts also consider "statements in the statute itself, former versions of the same statute," legislator's statements during debates, statements made at legislative hearings, comments by voters, and public official testimony.¹⁴² Sometimes the court will even analyze the purpose as though it were a statute.¹⁴³ This analysis limits the values of the Establishment Clause, as well as the political process, because it allows the courts to determine the role of an underlying policy by trying to discern the role of an illicit policy.¹⁴⁴ This necessarily follows when courts use actual purpose analysis instead of possible purpose analysis. The potentially large amount of legislative evidence compounds this by allowing comments to extend past the context in which they were mentioned and by using an often inadequate and deceptive record.¹⁴⁵

Burden-shifting analysis alleviates many of these concerns. Because burden-

136. *Id.* at 344.

137. *Id.* at 345.

138. Therefore, it is important to clearly define such integral terms as "purpose," "religious," and "secular purpose." See *infra* Part IV.B.

139. See *supra* note 101 and accompanying text.

140. See Culbertson, *supra* note 72, at 921.

141. *Id.* at 921-22.

142. *Id.* at 922 (footnote omitted).

143. See, e.g., *Edwards v. Aguillard*, 482 U.S. 578, 586-89 (1987) (trying to determine if a secular purpose is a sham, the Court goes through a statutory-type analysis).

144. See Culbertson, *supra* note 72, at 923.

145. *Id.* at 917.

shifting is concerned with possible purposes, it can extend its inquiry past the record and into the arguments advanced by, and the evidence submitted by, counsel.¹⁴⁶ It will allow intrinsic evidence by the plaintiff to show that the state had a religious purpose in violation of the Establishment Clause. If this threshold is met, then the state would have the burden of showing that the action had an adequate independent purpose, which alone would have been sufficient to allow the law to pass, and that the action is narrowly tailored to serve that purpose. This satisfies those who want stricter separation of church and state because it gives the purpose prong of *Lemon* more power. It also appeases some of the concerns of those who dislike the current state of motivational analysis because it allows comments that were made in a different context,¹⁴⁷ such as in a time when religious motivation did not invalidate state action unless it was a gross violation of the Establishment Clause, to be compared with current state interests. Burden-shifting does not bind the state to the record if its interests have evolved since the record was created.

III. A CASE FOR A CHANGE: WHY A BURDEN-SHIFTING ANALYSIS SHOULD BE THE STANDARD

In order to ensure the liberties that the Establishment Clause exists to protect, state action should not pass Establishment Clause scrutiny unless it works to achieve an independent and sufficient secular purpose. The Establishment Clause exists to ensure our religious freedom, something that is unique and personal. To allow state action with a legitimate secular purpose, but with an overriding and prevalent religious purpose, to survive scrutiny places those freedoms in jeopardy. For example, a state could pass a law that would have the majority of its purpose, either explicit or implicit, to help further or establish one religion, and this law would pass scrutiny as long as some manifestation of a legitimate secular purpose existed.

A. *Current Weight of Motivational Analysis*

As previously discussed, Establishment Clause analysis is unique in that purpose alone can constitute a violation even if completely divorced from effect.¹⁴⁸ Seemingly in light of this, the Court has consistently held that any secular purpose, if legitimate, precludes a violation based solely on the purpose behind the action.¹⁴⁹ The Court has also held that the purpose of the state action must be legitimate.¹⁵⁰ However, courts are reluctant to find that the

146. See *infra* Part IV.A (describing actual and possible purpose analysis).

147. See, e.g., *Metzl v. Leininger*, 57 F.3d 618, 619, 621, 623 (7th Cir. 1995) (using a governor's comments, made at a time when such comments were not illegal, as evidence in invalidating a Good Friday holiday).

148. Culbertson, *supra* note 72, at 917.

149. LEVY, *supra* note 17, at 157.

150. See, e.g., *Edwards v. Aguillard*, 482 U.S. 578, 586-87 (1987) (deciding whether the purpose of a statute was a sham); *Wallace v. Jaffree*, 472 U.S. 38, 57 (1985) (examining the

state has violated the Establishment Clause on purpose analysis alone, and courts generally defer to a state's articulation of a purpose if it is sincere and legitimate, even if it is not the preponderant purpose behind the action.¹⁵¹

It is conceivable to have a jurisdiction where a law has no adverse effect on the people (all people are of a certain religion and favor a religious holiday to be recognized by the state, for example), where the statute has been enacted in a way that its effect in establishing a religion is delayed, or where the potential for an unconstitutional adverse effect is real, though in actuality it has not yet occurred. Because the courts allow a plaintiff to bring an action, even if Establishment Clause values are offended, it is in line with this policy of considering values to take into account the possible religious purpose, if it can be clearly shown, and therefore the potential effect(s) of the state action. Because this analysis necessarily goes beyond legislative interpretation, the standard should be raised from having to prove any legitimate secular purpose to one where the purpose of the state action should be independently secular in nature and narrowly tailored to serve the secular purpose.

While courts generally accept whatever secular purpose the government, whether federal, state, or local, proffers,¹⁵² there are exceptions. Under *Stone v. Graham*,¹⁵³ the Court held that the proffered purpose was not legitimate and the actual purpose was invalid.¹⁵⁴ In *Stone*, the Court found that the posting of the Ten Commandments violated the purpose prong of *Lemon* because:

The pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature. The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact. The Commandments do not confine themselves to arguably secular matters, such as honoring one's parents, killing or murder, adultery, stealing, false witness, and covetousness. Rather, the first part of the Commandments concerns the religious duties of believers: worshipping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day.¹⁵⁵

In *Stone*, the Court found that the item at issue, namely the Ten Commandments, were of such a religious nature that they overshadowed the proffered secular purpose.¹⁵⁶

legitimacy of the purpose behind school prayer).

151. See *Metzl v. Leininger*, 850 F. Supp. 740, 746 (N.D. Ill. 1994), *aff'd*, 57 F.3d 618 (7th Cir. 1995).

152. See LEVY, *supra* note 17, at 157.

153. 449 U.S. 39 (1980) (per curiam).

154. *Id.* at 41-42.

155. *Id.* (footnote and citations omitted).

156. See *id.* The proffered secular purposes were, "the promotion of moral values, the contradiction to the materialistic trends of our times, the perpetuation of our institutions and the teaching of literature." *Id.* at 41 (quoting *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 223

A similar evaluation took place in *Wallace v. Jaffree*,¹⁵⁷ where the statute was found to have the actual purpose of advancing religion.¹⁵⁸ In *Wallace*, the Court held that, because the purpose behind a statute that required a moment of silence for prayer or contemplation was in violation of the Establishment Clause, because it advanced religion, the statute was unconstitutional.¹⁵⁹

In *Epperson v. Arkansas*,¹⁶⁰ decided before *Lemon*, the Court held invalid a statute that made it illegal to teach evolution in public schools.¹⁶¹ The statute was held unconstitutional under a standard that independently evaluated purpose and effect, and the Court held that if either advanced or inhibited religion the statute was unconstitutional.¹⁶²

In *Metzl v. Leininger*, a case involving an Illinois Good Friday school holiday, the Seventh Circuit found that because the purpose behind the statute's original enactment was religious, and that because the state had not offered any concrete evidence to show that purpose was superseded, it was unconstitutional.¹⁶³ In the *Metzl* case, the court noted that the allocation of the burden of production was critical and, though not citing authority, rested that burden on the state.¹⁶⁴

However, while these cases illustrate the importance of a secular purpose in evaluating Establishment Clause jurisprudence and reveal the court's opinion that the purpose is clearly relevant, the majority of opinions hold that any proffered secular purpose, as long as it is legitimate, will suffice.¹⁶⁵ But this use of purpose raises some interesting and as of yet unclear questions. First of all, how much of the purpose must be secular? Secondly, who has the burden of showing that there was a legitimate secular purpose?

B. Why Have a Burden-Shifting Standard?

Motivational analysis is necessary to preserve the values of the Establishment Clause as a guardian of our religious freedom. If all courts evaluate the actual purpose behind the state action, the analysis is tainted because

(1963)).

157. 472 U.S. 38 (1985).

158. *Id.* at 56.

159. *See id.* at 40, 60-61.

160. 393 U.S. 97 (1968).

161. *Id.* at 107, 109.

162. *Id.* at 107. Quoting from *Abington School District v. Schempp*, 374 U.S. 203, 222 (1963), the Court stated: "[W]hat are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution." *Epperson*, 393 U.S. at 107 (alteration by Court).

163. 57 F.3d 618, 619, 621, 623 (7th Cir. 1995) (using a governor's comments, made at a time when such comments were not illegal as evidence in invalidating a Good Friday holiday).

164. *Id.* at 622.

165. *See, e.g.,* *Bridenbaugh v. O'Bannon*, 185 F.3d 796, 800-01 (7th Cir. 1999) (noting that the secular purpose need not be exclusive, and that the court is generally deferential to the state's articulation of a secular purpose).

it is mired in the history of its passage and is subject to all of the problems of statutory interpretation.¹⁶⁶ Many statutes were passed at a time when celebrating their religious significance was not in violation of the Establishment Clause.¹⁶⁷ Also, now that legislatures know that their statutes may come under Establishment Clause scrutiny, the legislatures enact statutes leaving a record that will enable them to pass this scrutiny.¹⁶⁸

A standard that allows the plaintiff to show clearly the illegitimate purpose behind the state's action, thereby forcing the government to defend its action against that possibility, assures that both those laws that may have been struck down but now are legitimate, as well as those laws otherwise unconstitutional but that have concealed their illegitimacy, are justly adjudicated. In other words, a burden-shifting analysis allows those laws that may have been unconstitutional, as judged by present standards, when they were enacted many years ago but that have evolved into constitutional and effective state action to be held constitutional. A burden-shifting standard also invalidates state actions that hide behind a stated secular purpose that was articulated in the anticipation that the action would be challenged.

C. Policy Justifications for Using a Burden-Shifting Model

A burden-shifting model puts the burden on the people who are in the best position to know what they are trying to prove. Initially, the burden is on plaintiffs to show that they have been harmed. Those who allege an injury are in the best position to know if they have in fact been injured. After this initial threshold burden is met, the burden shifts to the government to justify the purpose behind its actions. The government is in the best position to know what its justifications are.

Because this is a hard standard for the government to meet, it encourages full disclosure by the state. Additionally, the court must find that the action was narrowly tailored to serve the legitimate purpose, thereby ensuring a safeguard against the infringement of our religious liberty. If the government cannot show that this action does not violate the Establishment Clause, the action will fail.

Additionally, a burden-shifting model does not accept just any proffered secular purpose by the state or possible religious infringement claimed by the plaintiff. The state must show that the secular purpose is independently sufficient to justify the action. The plaintiff must show that the purpose is clearly religious, putting the onus on the plaintiff to understand and describe the liberty that is allegedly being abridged.

166. See *supra* notes 139-45 and accompanying text.

167. See *Metzl*, 57 F.3d at 624 (Manion, J., dissenting).

168. For example, Indiana recently passed a law allowing the posting of the Ten Commandments because of their historical significance. See IND. CODE §§ 4-20.5-21-2, 36-1-16-2 (Supp. 2001).

D. Distilling the Religious from the Secular Purposes

While any secular purpose is currently enough to satisfy the purpose prong under *Lemon*,¹⁶⁹ under a burden-shifting analysis this would no longer be the case. Because the secular purpose would need to be sufficient enough to stand alone, independent of the religious purposes, issues will arise when the secular purpose is related to religion.¹⁷⁰

State action combined with some religious motivation should not be unconstitutional on that basis alone. Churches and religious organizations have assumed powerful roles in our communities and in ways that do not advance their doctrinal beliefs. As federal and state governments seek to diminish their role in providing entitlements, religious organizations have increased their programs to provide much-needed aid. Often these same religious organizations receive funding to help with specific programs or benefits. A burden-shifting standard does not disqualify religious organizations from receiving such funding or other support so long as the secular justifications are independently sufficient and the solution is narrowly tailored to serve those legitimate interests.

E. The Narrowly Tailored Requirement of Burden-Shifting Analysis

Governments should be required to show that their action is narrowly tailored to serve the secular interest because of the fundamental right of religious freedom and in order to ensure that government does not have the ability to erode Establishment Clause values merely because it has evoked a legitimate secular purpose. That the First Amendment Establishment Clause states there shall be “no law” regarding an establishment of religion sets a high standard for the state to overcome in enacting laws dealing with religion. The best method by which to apply such a standard is to ensure that the state action, though affecting or even involving religion, serves a clear and independently sufficient secular purpose.

To allow state action to serve a clear and independent secular purpose, but not be narrowly tailored to serve that purpose, would enable government to act in any way related to that purpose. Therefore, the component of the burden-shifting standard that requires the state action to be narrowly tailored to serve the secular purpose ensures that the state action is in fact related to that purpose and is necessary to ensure that the action does not expand beyond its constitutional scope.¹⁷¹

169. See, e.g., *Freiler v. Tangipahoa Parish Bd. of Educ.*, 185 F.3d 337, 344 (5th Cir. 1999) (holding any secular purpose is sufficient, even if it is “in a sea of religious purposes”).

170. See *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 335 (1987) (stating that the secular purpose need not be unrelated to religion.); *Lynch v. Donnelly* 465 U.S. 668, 673 (1984) (noting that the Constitution also requires accommodation of religion).

171. It is not farfetched to consider what would happen without the “narrowly tailored” requirement. The state could have a legitimate purpose and the action would be constitutional in a manner similar to the federal government’s use of the Commerce Clause, namely saying all action

F. Who Currently Has the Burden of Showing There Is a Legitimate Secular Purpose?

Courts have struggled with whether the plaintiff or the defendant has the burden of production as to whether a legitimate purpose exists. In *Metzl v. Leininger*, the Seventh Circuit reasoned that the burden of production should be on the state.¹⁷² The court determined that because a justification of a statute that honors an unambiguously sectarian holiday “is in the nature of a defense,” and because the normal burden of producing evidence of a defense is on a defendant, the state should be required to show that the statute has a legitimate purpose.¹⁷³ The court further noted that where the government asserted a secular justification for a law, it then bore the burden to produce evidence to support that justification.¹⁷⁴

At issue in *Metzl* was a statute that created a Good Friday holiday for schools. When the statute was enacted, the governor of Illinois offered a statement that clearly revealed that the statute was enacted so Christians could properly commemorate that sacred holiday.¹⁷⁵ The same issue again came before the Seventh Circuit four years later in *Bridenbaugh v. O'Bannon*,¹⁷⁶ and the court held that the state had met its burden by showing that, for purposes of a holiday for state employees, no schools or businesses have a higher percentage of people celebrating “a spring holiday on any other Friday.”¹⁷⁷ The court held that the state merely had a burden to show some sort of “secular justification for choosing Good Friday” as a holiday.¹⁷⁸ By showing no other Friday in spring was better, this burden was held to have been met.¹⁷⁹

As can be illustrated from the above example, even courts in the same circuit struggle with how exactly the burden to show a legitimate secular purpose should be apportioned. Because the courts seem willing to accept any proffered secular purpose as long as it is reinforced by evidence,¹⁸⁰ it seems that if the legislature is willing to call an apple an orange and find some extrinsic evidence to support its statement, the purpose is accepted as legitimate and secular. This current analysis puts the very basic tenets of the Establishment Clause in danger; therefore, the courts should adopt a different way to apportion the burden that is

is related to the proffered purpose, thereby expanding the scope of the Establishment Clause to things otherwise unconstitutional. Of course, there would still be some sort of effect analysis that the action must pass, but motivational analysis would be effectively dismantled.

172. 57 F.3d at 622.

173. *Id.*

174. *Id.*

175. *Id.* at 619.

176. 185 F.3d 796 (7th Cir. 1999).

177. *Id.* at 799 & n.4.

178. *Id.* at 799 n.4.

179. *Id.* at 799 & n.4.

180. See *Cammack v. Waihee*, 932 F.2d 765, 777 (9th Cir. 1991) (finding a legitimate secular purpose to be enjoying a holiday on Good Friday).

in line with the potential purpose analysis previously discussed.

IV. HOW A BURDEN-SHIFTING STANDARD WOULD APPLY

A. How to Determine if the Purpose Is Clearly Religious

In order for plaintiffs to make a *prima facie* case under the burden-shifting method, they must show that the purpose of a statute is clearly religious. When discussing the purpose behind state action, in essence one is discussing what the motivation is behind the state action. This becomes difficult in Establishment Clause analysis because the purpose may change over time.¹⁸¹ There are two traditional ways to ascertain the purpose of the statute: possible purpose analysis and actual purpose analysis.¹⁸²

Possible purpose analysis “considers the language of the statute” and counsel’s arguments concerning the purpose behind it.¹⁸³ “[T]he possibility of a legitimate purpose is [generally] all that is required to satisfy this prong.”¹⁸⁴ The court in this type of analysis is concerned with whether there is any government interest to justify this action.¹⁸⁵ Actual purpose analysis differs because instead of relying on counsel to articulate the purpose, the court looks only to the legislature.¹⁸⁶ In actual purpose analysis, the court looks to the stated considerations by the decision-making body to see if they were illegitimate or legal.¹⁸⁷ Because of this, actual purpose analysis can be difficult to overcome because the legitimate purpose must have been clearly and honestly stated by the decision-making body.¹⁸⁸

One problem with possible purpose and actual purpose analyses, as they relate to a burden-shifting approach to the Establishment Clause, is that in the burden-shifting model, the court is not concerned with whether an actual legitimate purpose exists to validate a statute, but whether an impermissible and clearly religious purpose exists to shift the burden to the defendant. Because of the nature of this burden-shifting and the fact that it is concerned with current motivation for the action, not past motivation, the proposed model utilizes a possible purpose analysis to show that state action has a clearly religious purpose.¹⁸⁹

181. *Cf. Metzl v. Leininger*, 57 F.3d 618, 619, 621, 623 (7th Cir. 1995) (using a governor’s comments, made at a time when such comments were not illegal, as evidence in invalidating a Good Friday holiday).

182. Culbertson, *supra* note 72, at 917-18.

183. *Id.* at 918.

184. *Id.* “An example . . . is found in equal protection cases where no suspect criteria are involved.” *Id.*

185. *Id.*

186. *Id.* at 919.

187. *Id.*

188. *See id.*

189. When this Note refers to “possible purpose,” it does so pursuant to the notion that it is

B. Defining "Religious"

In order to ascertain whether a clearly religious purpose exists, one must couple the possible purpose analysis discussed above with whether something is religious. The Court has avoided attempting to define "religion" and "religious."¹⁹⁰ Defining the term "religious," especially at the fringes of its meanings, is an almost Sisyphean task.¹⁹¹ At the center is the well-accepted, traditional meaning that the belief in a deity, at least partially characterized by "spiritual" and "otherworldly" concerns, including those involving the will of God, is religious.¹⁹² There is no single characteristic or set of characteristics that defines "religion" or "religious."¹⁹³ To add to the confusion, the religion clauses seek incongruent definitions, for the Free Exercise Clause demands a broad definition, while the Establishment Clause seeks a narrower one.¹⁹⁴ These definitions are incompatible so as to maximize individual liberty, protect individual religious conduct, and limit the constraints on government.¹⁹⁵ This has caused some to clamor for separate definitions under the different clauses.¹⁹⁶

The Court has worked most diligently toward a definition of religion in regards to the Selective Service Act.¹⁹⁷ While these cases involved statutory construction and not constitutional interpretation, the Court agreed with the statutory definition necessitating the involvement of a "Supreme Being"¹⁹⁸ and only talked about the definition of "religious" in a plurality opinion.¹⁹⁹ That opinion later defined "religious" as one whose notions or morality and ethics stem from a "Supreme Being" and whose beliefs, in particular the beliefs that impose a duty to act or abstain from action, occupy "a place parallel to . . . God" in the life of that person.²⁰⁰

The Court has also struggled with a definition in situations manifesting a sincerely held belief.²⁰¹ If one claims that he is exempt from a law or is adversely affected by the Establishment Clause because of a sincerely held belief, then the

looking for the state's possible impermissible purpose.

190. See CHEMERINSKY, *supra* note 23, at 972.

191. See Conkle, *supra* note 105, at 5. For further discussion, see also Jesse Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579; Stanley Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses*, 41 STAN. L. REV. 233, 285-86 (1989).

192. Conkle, *supra* note 105, at 5.

193. CHEMERINSKY, *supra* note 23, at 972.

194. *Id.*

195. *Id.*

196. *Id.* at 973.

197. *Id.*

198. *Id.* (citing *United States v. Seeger*, 380 U.S. 163, 164-65 (1965)).

199. See *id.* at 974 (citing *Welsh v. United States*, 398 U.S. 333, 337 (1970)).

200. *Welsh*, 398 U.S. at 340.

201. See CHEMERINSKY, *supra* note 23, at 975.

Court must decide whether to accept that belief as valid.²⁰² The Court has held that the standard is not one of truth, but whether the beliefs are sincerely held.²⁰³ The problem here is that there cannot be an objective test for sincerity.²⁰⁴

The most adequate way to assess whether something is religious is to associate the activity with prevailing doctrines of a particular religion.²⁰⁵ However, because religion is essentially a personal experience and one may have individual beliefs outside the canon of a particular religion, this is problematic.²⁰⁶ This is more problematic when evaluating individual religious freedoms than when evaluating whether state action has a clearly religious purpose. Because state action necessarily involves more than one person, and often many people, it logically follows that the religious component, if it exists, must also manifest its existence in the creed of those acting on behalf of the state. Therefore, for Establishment Clause purposes, the inquiry to determine if a doctrine is clearly religious should stem from reference to prevailing religious doctrines.

This last model works best with a burden-shifting method because the onus falls on the plaintiff to prove whether the act was religious. Obviously the easiest way to do so is to compare the action with doctrinal beliefs of a particular religious sect or denomination and determine whether the state action was in furtherance of those beliefs. Because generally state action in the area of religion will occur in a majoritarian concept, meaning that the state will not act unless there is a perception that many, if not most, of the affected citizens will agree with the action, often the divergent and difficult issues of whether something is or is not religious will dissolve.

C. Why a Burden-Shifting Approach Helps Solve These Problems

Many of these semantic pitfalls would be overcome with a burden-shifting model. If the plaintiff had the burden to show that a purpose behind the statute was clearly religious, the issue then becomes not how much of a secular purpose versus a religious purpose must exist, but whether an actual religious purpose exists at all. Proving this would then shift the burden to the state to justify the secular purpose as motivation for the state action. This shift would dissolve an argument as to whether the secular purpose existed at all or whether it was clear. This would shift the focus to whether the secular purpose or the state's secular

202. *See id.* There are some intriguing cases in this area, including a woman who claimed to be priestess of a church where the sacrament was sex for money; she was arrested for prostitution. *Id.* There was also a group who used marijuana as a "sacrament" and declared their sacred motto to be "Victory over Horseshit." *Id.* (citing *United States v. Kuch*, 288 F. Supp 429, 445 (D.D.C. 1968)).

203. *See United States v. Ballard*, 322 U.S. 78, 86-87 (1944).

204. *See id.* at 93 (Jackson, J., dissenting). "If we try religious sincerity severed from religious verity, we isolate the dispute from the very considerations which in common experience provide its most reliable answer." *Id.*

205. *CHEMERINSKY*, *supra* note 23, at 976.

206. *Id.* The Court has held that dominant views of a religion are insufficient to determine if a particular belief is religious. *See, e.g., Thomas v. Review Bd.*, 450 U.S. 707, 714 (1981).

motivation for the action is sufficient reason for the state action.

For the plaintiff the pivotal question in the burden-shifting model is not how much of a secular purpose exists, but whether a clearly religious one exists. By then shifting the burden and forcing the state to prove its case on its own merits, it theoretically diffuses much of the “he said, she said” bickering to decide what the true motivation is. While whether the secular purpose is independent and sufficient is still a fact-based analysis, it is an analysis where the state must prove its case against a standard—not an adversary. This forces the state not to impeach or attack the plaintiff’s argument, but rather to persuasively present its own thesis. By not forcing the court to decide which side had the better case, but rather whether each side met its respective standard, the values of the First Amendment are further upheld, not merely made to settle for the victor in an adversarial court battle.

D. Other Burden-Shifting Solutions: The Disparate Impact Model

The burden-shifting method of assessing who has the burden and what evidence arises to show the burden has been met can be found in Establishment Clause jurisprudence. For example, in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,²⁰⁷ the Court held that once a plaintiff had shown that a decision was motivated in part by an impermissible purpose, the burden shifts to the defendant to show that the same decision would have been made even if the impermissible purpose had not been included.²⁰⁸ This allows the party in the best position to know the purpose behind an action to defend it, while assuring that the party claiming to be injured was in fact injured by the governmental action.

This transfers to the Good Friday cases previously cited, for example, because under the burden-shifting standard the plaintiff must initially show that enacting a holiday has, or has the potential to have, as its purpose the establishment of religion, which is unconstitutional.²⁰⁹ The state would then have the burden to show two things. First, regardless of the solemnity of the holiday, the particular day would be celebrated anyway (the narrowly tailored aspect). Second, the reason that Good Friday was celebrated was adequate and independent of the religious purpose.

While on its surface that standard may seem insurmountable, it is not. What it does is force the state, in a situation like Good Friday, to discover and articulate the secular reasons for its actions. The state would have to show economic evidence, for example, that it would be more cost effective to have a holiday on that particular day.

Additionally, it would allow into evidence things that the court had not previously considered. For example, the government would be forced to consider

207. 429 U.S. 252 (1977).

208. *Id.* at 270 n.21.

209. Indeed, the court in *Metzl* would have held that this initial threshold would have been met in the pleadings since Good Friday is a totally non-secular holiday that is celebrated by only one family of religions. *Metzl v. Leininger*, 57 F.3d 618, 620 (7th Cir. 1995).

why celebrating a holiday that changes dates every year, that is not a big travel day, that is determined by consulting a religious calendar, and that may not be as convenient as the day after Easter should be celebrated by the state.²¹⁰

E. Justiciability of Motivational Analysis

Because this Note advocates a test to evaluate a state purpose, the problem of justiciability, particularly by ripeness, arises because it could be asserted that the injury has not yet occurred. This argument can be met by either one of two ways. First of all, the purpose prong is not a stand-alone test and can be paired with the effect prong. Because the effect can be a potential violation, the claim is ripe if potential for adverse effect exists. This notion is reinforced by the second method, which is to look at whether the purpose erodes the values of the Establishment Clause. The Court, in *Santa Fe Independent School District v. Doe*,²¹¹ has held that if Establishment Clause values are eroded, there is a cause of action.²¹² Because values are eroded with the potential of a violation, the case is therefore ripe.²¹³

CONCLUSION

Burden-shifting motivational analysis of state action should be adopted for four reasons. First, it makes the standard more difficult for the defendant to overcome. This is the surest way to preserve the values of the Establishment Clause and will force states to have sound and constitutional reasons to act in the personal and sensitive area of religious liberty.

Second, it will provide a clearer standard to guide state action and define individual rights. Currently the courts interpret motivational analysis under the Establishment Clause in a manner that varies by jurisdiction and that seems to reinforce whatever result a court wishes to reach—a result that is often inconsistent and largely unforeseeable.²¹⁴ By developing a clearer standard, the understanding and protection of individual religious rights, as well as the limits of state action with regards to religious freedom, will be bolstered.

Third, a burden-shifting standard protects religion. By allowing those religious programs and activities that have a clearly viable secular purpose, such as substance abuse treatment, to receive state funds and pass constitutional scrutiny protects these activities in the future. It gives a much clearer line as to what motivation and purposes will be allowed to benefit from state action and what will not, instead of the current standard that requires states and religious groups to work in concert until costly litigation validates or invalidates their

210. For discussion of the Good Friday holiday, see *Bridenbaugh v. O'Bannon*, 185 F.3d 796, 797 (7th Cir. 1999); *Metzl v. Leininger*, 57 F.3d 618, 620 (7th Cir. 1995); and *Cammack v. Waihee*, 944 F.2d 466, 467 (9th Cir. 1991).

211. 530 U.S. 290 (2000).

212. *Id.* at 313-16.

213. *See id.*

214. *See supra* note 5 and accompanying text.

actions.

Finally, a burden-shifting standard will more clearly define a state's current motivation. By using a possible purpose analysis to see whether the action violates the Constitution, not whether it passes scrutiny, and then shifting the burden to the state, the state is able to overcome the trappings of history that may hold an action unconstitutional. For example, if eighty years ago a state decided to act in a way that was supportive of a particular religion, and the record reflects such motivation in a manner that—by the record alone—is unconstitutional, by giving the state a chance to explain the secular purposes relevant today and to show that the action is narrowly tailored to serve the interest, the state action will be preserved.

It is time the courts began an honest and open discussion about what is motivating state action in the area of religion. It is time we had a standard under Establishment Clause motivational analysis that encourages such discussion. Many great ideas involve some element of religious significance, and by enabling both sides of the argument to discuss with force and honesty the feared violations and actual motivations of their actions, the Establishment Clause will continue to be one of the greatest achievements of our Constitution.

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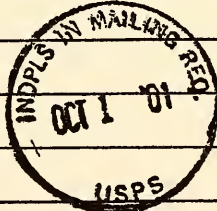
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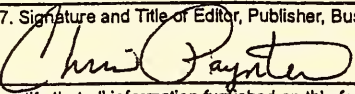
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